OUR LOCALISM: PART II—LOCALISM AND LEGAL THEORY*

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A. A Tale of Two "Cities": Local Governments in Local Government Law

A central theme in the literature of local government law is that local governments are powerless, incapable of initiating programs on behalf of their citizens or of resisting intrusions by the state.¹ How can scholars make this claim when under state legislation and federal and state judicial decisions local autonomy plays a critical role in the law of school finance,² land-use regulation³ and local government formation and preservation?⁴ As we have seen, a partial response turns on the varying assessments of the nature of power.⁵ But much of the answer also has to do with differing assumptions about the underlying political, economic and social characteristics of local governments.

There are more than 82,000 local governments in the United States, but when most scholars write about local governments generally they are, I suspect, thinking about one particular category of localities: cities. For example, Professor Frug's analysis of local government law is styled "The City as a Legal Concept."⁶ Professor Ellickson's contrast of public and private local organizations is titled "Cities and Homeowners Associations."⁷ And Professor Clark's study of local legal autonomy is called "Judges and the Cities."⁸

There is some sense to this. Although a minority of all local gov-

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1. See Briffault, *Our Localism*, Part I, 90 Colum. L. Rev. 1, 6-12 (1990).

2. See *id.* at 24-39, 59-64, 99-101.

3. See *id.* at 39-58, 64-72, 101-09.

4. See *id.* at 72-86, 109-11.

5. See *id.* at 111-115.

6. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980) [hereinafter "City as Legal Concept"]; see also Frug, *Empowering Cities in a Federal System*, 19 Urb. Law. 553 (1987) [hereinafter "Empowering Cities"].

7. Ellickson, *Cities and Homeowners Associations*, 130 U. Pa. L. Rev. 1519 (1982) [hereinafter "Cities"]. Professor Ellickson is aware of the centrality of suburbs to American local government law. See Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385 (1977) [hereinafter "Growth Controls"]. Nevertheless, when he addresses the issue of local public power generally he writes of "cities."

8. G. Clark, *Judges and the Cities: Interpreting Local Autonomy* (1985). The title of Professor Williams's examination, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 Wis. L. Rev. 83, also assumes the equation of "local government" with "city," although within the body of her article she criticizes the practice of "lumping together these disparate [local] entities into one legal category" *Id.* at 83 n.1.

ernments,⁹ cities are the most numerous form of general purpose local government. In areas with multiple local governments, cities are the focus of local political life. As a matter of legal analysis, the term "city" sharpens the distinctions with "state" and with unincorporated rural areas. "City" thus serves as an understandable shorthand for the more cumbersome "local government."

But "city" is a loaded term; indeed, it is an overloaded one, the use of which ultimately obscures legal analysis. "City" is not just a synonym for "municipal corporation"; it is also a political, economic and social concept that conjures up associations with respect to size, economics, politics, social life and history that the blander "local government" does not.¹⁰

"City" usually implies "big city" or "central city" or "inner city"—a large center of population and production, commerce, communications and culture, distinguished not simply from the "state" and the countryside, but also from small towns and suburbs. "City," according to Bernard Frieden, "suggests bustling streets with a mixture of factories, offices, apartments and homes crowded together amidst heavy traffic, noise, dirt and excitement."¹¹ Lewis Mumford defined the city "as a complex of inter-related and constantly interacting functions" that large size and density make possible.¹² For Jane Jacobs, similarly, the hallmark of "great American cities" is diversity—of people, functions, land uses and activities.¹³

As a social and a political concept, the city is a heterogeneous place, combining residence, work, recreation and cultural life, and mixing people of different racial and ethnic groups, socioeconomic classes and levels of educational and occupational attainment. "City," in short, signifies a complex microcosm of the state or nation and a socially, economically and culturally dynamic part of the larger polity. Such a "city" seems a fitting place for legal and political autonomy, which is no doubt why many advocates of local autonomy make their case in terms of cities.¹⁴

9. More than half of all local governments are special purpose districts. See 1 Bureau of the Census, 1982 Census of Governments 3 (table 3). In 1982, 43,439 of the more than 82,000 local governments were either special districts or school districts. Id. An additional 16,734 local units were townships, which tend to function as limited subdivisions of counties. There were 19,076 municipalities and 3,041 counties. Id.

10. As Robert Dahl observed in criticizing the use of the term "city" to describe local governments *too large* for effective participatory democracy, "names conceal realities." R. Dahl, *After the Revolution?: Authority In a Good Society* 157 (1970).

11. B. Frieden, *Metropolitan America: Challenge to Federalism* 17 (1966).

12. L. Mumford, *The City in History: Its Origins, Its Transformations, and Its Prospects* 85 (1961).

13. J. Jacobs, *The Death and Life of Great American Cities* 141–51 (1961).

14. See, e.g., Frug, *City as Legal Concept*, *supra* note 6, at 1119, 1120 nn.267–70. Frug's citations to Arthur Schlesinger's *The Rise of the City 1878–1898* (1933) and the work of the Chicago School of urban sociology indicate his association of "city" with "big city."

But once the term "city" is used in the sense of municipal corporation, used, that is, "as a legal concept," in Frug's phrase—then many "cities" are neither large nor complex nor heterogeneous. Most cities are small. Half of all municipal corporations have populations of 1,000 or fewer, and three-quarters of all municipalities have 5,000 people or fewer.¹⁵ Nearly one half of urban Americans live in municipalities of fewer than 50,000 people.¹⁶ Many "cities" are primarily residential, composed of homes and politically responsive to homeowner interests;¹⁷ others are primarily industrial or commercial, functioning as centers of employment but with relatively few residents.¹⁸ Many municipal corporations are not demographic microcosms of the state but are instead composed predominantly of people of one race or class.¹⁹

Simply put, in most metropolitan areas many of the entities the law defines as cities are—in social science parlance and lay understanding—suburbs.²⁰ More Americans reside in suburbs than in either central cities or rural areas, and sixty percent of the residents of metropolitan areas live in suburbs.²¹ In virtually every large metropolitan area, the suburbs outnumber the central city in both population and employment.²² The suburb, not the city, is the principal form of urban settlement in the United States today.

15. 1 Bureau of the Census, *supra* note 9, at 8–9 (table 6). Of 19,076 municipalities, 9,514 had fewer than 1,000 people and an additional 5,850 had between 1,000 and 5,000 people. *Id.*

16. *Id.*

17. See J. Logan & H. Molotch, *Urban Fortunes: The Political Economy of Place* 191–92 (1987) (discussion of exclusive residential towns); Ellickson, *Growth Controls*, *supra* note 7, at 404–07 (discussion of homeowner domination of politics in suburban residential communities).

18. See J. Harrigan, *Political Change in the Metropolis* 249–50 (4th ed. 1989) (approximately one-third of suburbs are purely residential, another third are employment suburbs and the final third are mixed residential and industrial).

19. See *id.* at 250–51 (categorizing suburbs according to demographic distinctions among residents—predominantly affluent, middle-class, working-class, black and elderly).

20. In particular, a majority of the municipalities incorporated in recent decades are suburbs. See Miller & Forstall, *Annexations and Corporate Changes: 1970–79 and 1980–83*, in *The Municipal Year Book* 1984 at 96, 100–01 (Int'l City Management Ass'n ed. 1984) (most of the 788 localities incorporated between 1970 and 1983 were "suburban in character"); see also D. Elazar, *Building Cities in America: Urbanization and Suburbanization in a Frontier Society* 4 (1987) (noting "the non-urban character (in common sense usage) of American urban settlements (in Census Bureau usage)").

21. In 1980, 45% of Americans lived in suburbs, 30% lived in central cities and 25% lived in nonmetropolitan areas. In other words, 60% of the residents of metropolitan areas lived in suburbs. See U/S: *A Statistical Portrait of the American People* 27 (A. Hacker ed. 1983).

22. Of the 25 largest metropolitan areas in 1980, the central city had a majority of the population in only two. See M. Baldassare, *Trouble in Paradise: The Suburban Transformation in America* 7 (1986). The suburbs accounted for 70% or more of the metropolitan population in the Detroit, Washington, D.C., Boston, St. Louis, Pittsburgh, Atlanta and Miami areas. See *id.* at 26. The suburbs have also become major centers of industrial employment. In 1980, there were eleven million people em-

Cities and suburbs differ from each other politically, economically and socially. Notwithstanding these differences, local government law does not distinguish within the category of municipal corporation between city and suburb, and legal theory generally has not taken the differences between cities and suburbs into account. Law and legal theory both treat most suburbs as cities, and this critically affects any attempt to measure the scope of local power.

Incorporated suburbs usually have the same legal status as central cities.²³ Even those suburbs not accorded the full panoply of big city powers generally enjoy the fundamental elements of local autonomy: the authority to tax property, spend on local services and regulate land use,²⁴ and the right to come into governmental existence and protect local autonomy from nonconsensual absorption into another locality. Indeed, local legal powers may be more adequately matched to local economic and social needs in the suburbs than in the cities.

The logic of local legal autonomy assumes local solutions to local problems, with local programs funded by taxes on local property.²⁵ Many big cities, however, have relatively large social welfare and infrastructure demands.²⁶ Local political existence, zoning autonomy and

played in manufacturing in the suburbs, as opposed to just six million in the central cities. *Id.*

23. Some states classify localities and tailor the scope of local authority according to population size so that smaller localities have fewer powers than larger ones. But state classification systems often treat as "first-class cities" localities with surprisingly small populations. In Arkansas, the minimum population for a first-class city is 2,500, Ark. Stat. Ann. § 14-37-103 (1987); in Kansas the minimum is 15,000, Kan. Stat. Ann. § 13-101 (1982); in Nevada it is 20,000, Nev. Rev. Stat. Ann. § 266.055 (Michie 1986); in South Dakota, 5,000, S.D. Codified Laws Ann. § 9-2-1 (1981); in Virginia, 10,000, Va. Code Ann. § 15.1-1011 (1981); in Washington, 20,000, Wash. Rev. Code Ann. § 35.22.010 (1965); see also 1 Bureau of the Census, *supra* note 9, at 118, 182, 241, 301, 319, 325. And, of course, not all suburbs are small.

24. See Briffault, *supra* note 1, at 18-25; see also M. Baldassare, *supra* note 22, at 123-45 (discussing tax planning and service expenditures in Orange County, California suburbs); M. Danielson, *The Politics of Exclusion* 50 (1976) (in 1968 more than half of suburbs with populations greater than 5,000 had the power to zone, as did nearly half of the smaller suburbs); J. Harrigan, *supra* note 18, at 282 ("Almost universally in suburbs [the issues that dominate local politics] are taxes, schools, and zoning."); V. Ostrom, R. Bish & E. Ostrom, *Local Government in the United States* 206-07 (1988) (discussing city-suburb tax competition); R. Wood, *Suburbia: Its People and Their Politics* 164 (1959) (tax rates among central issues in suburban politics); *id.* at 186-94 (discussing centrality of schools and school expenditures in suburban politics).

25. According to Hicks, the property tax, which "matured in congruence with the urban-industrial system," is based on a concept of localism that assumes that "localities are . . . self-contained entities whose tax bases can be harnessed to serve local needs in accordance with local wishes . . ." Hicks, *The Property Tax and Local Finance*, in *The Property Tax and Local Finance* 208, 217 (C. Harriss ed. 1983).

26. Central cities must deal with the problems of poverty, unemployment, dependent populations, crime, drug addiction, deteriorating housing and crumbling roads, bridges and mass transit, even as many of them are in economic decline. See R. Burchell, J. Carr, R. Florida & J. Nemeth, *The New Reality of Municipal Finance: The*

taxable property provide neither the regulatory authority nor the revenues necessary to meet these problems. To cope successfully with local needs, these cities must look beyond the city limits to outside public and private actions: intergovernmental aid, additional revenue-raising authority from the state and private investment.

Many big cities are heavily dependent on intergovernmental aid to balance their budgets, pay their employees and satisfy local demands for basic public services.²⁷ In terms of local political independence, it is an open question whether big cities are better off with intergovernmental aid, which often comes with strings attached, or without it.²⁸ But there should be no question that the fiscal dependency of many big cities means that local legal authority alone is not sufficient to create real local autonomy.²⁹

Many big cities also need to raise revenues from internal sources other than real property. As commercial and production centers that provide services and employment opportunities to nonresidents, cities may be able to develop alternative bases of local revenues. Many states have, in fact, given some of their cities power to tax incomes and sales as well as property,³⁰ yet these cities continue to be gripped by severe fiscal strain. Even for cities with relatively broad revenue-raising authority, the inadequacy of local financial resources is often a central fact of local existence—and a structural limitation on local political autonomy.

Moreover, the realities of interlocal relations restrict the ability of big cities to exercise fully the revenue-raising authority they do have.

Rise and Fall of the Intergovernmental City 93–132 (1984) (discussing fiscal burdens faced by cities).

27. See, e.g., *id.* at 219–58.

28. Compare Pfiffner, *Inflexible Budgets, Fiscal Stress, and the Tax Revolt*, in *The Municipal Money Chase: The Politics of Local Government Finance* 37, 57 (A. Sbragia ed. 1983) (“State aid . . . often diminishes home rule and increases the centralization of control at higher levels of government, for there is a tendency for those who control financing to try also to control policy. . . . Spending priorities are eventually decided in state rather than in local political arenas.”) with T. Clark & L. Ferguson, *City Money: Political Processes, Fiscal Strain, and Retrenchment* 224–32 (1983) (“[A]utonomy is preserved by adapting outside funds to local preferences . . .”) and D. Elazar, *supra* note 20, at 168 (the wide range of federal aid programs protects local autonomy).

29. Robert Dahl has observed, “the greatest inroads on the autonomy of the city result from its lack of financial resources.” R. Dahl, *supra* note 10, at 164.

30. See, e.g., Cal. Rev. & Tax. Code § 7201 (West 1987) (authorizing counties to levy sales and use taxes); *id.* § 7202.6 (Supp. 1990) (authorizing city redevelopment agencies to levy sales and use taxes); N.Y. Tax Law §§ 1202a–j (McKinney 1987 & Supp. 1990) (authorizing hotel and motel taxes levied by various counties); *id.* § 1301 (authorizing cities with over one million people to tax residents’ incomes); *id.* § 1340 (authorizing cities with populations between 190,000 and 215,000 to tax commuters’ incomes); Ohio Rev. Code Ann. §§ 718.01–.06 (Baldwin 1988) (municipal income tax); Pa. Stat. Ann. tit. 53, § 6902 (Purdon 1972 & Supp. 1989) (city income and sales taxes); *id.* tit. 72, § 4750.521 (Supp. 1989) (optional county sales and use taxes); see J. Aronson & J. Hilley, *Financing State and Local Governments* 142–50 (4th ed. 1986).

The fiscal well-being of most localities is determined fundamentally by the decisions of private taxpaying individuals and revenue- and employment-generating businesses to move to, remain in, expand in or depart from the geographical confines of the city.³¹ Local dependence on private investment decisions limits the utility of legal autonomy for localities generally,³² but for big cities with serious social welfare and infrastructure problems, straitened economies and traditionally high tax rates, the significance of formal legal power is particularly uncertain. Big city revenue-raising authority is severely constrained by the cross-cutting pressures to hold taxes low enough to make the city attractive to businesses and affluent residents while keeping taxes high enough to fund essential infrastructure and social welfare programs.³³ Big city zoning authority is comparably affected by the need to assure the availability of land for new economic development.³⁴

Even when cities deploy the full array of municipal powers to the satisfaction of business and high-income residents, there is no guarantee of success.³⁵ Local power is merely the power to bargain and persuade, to make concessions, provide incentives and reduce or eliminate local taxes or restrictions; it is not the power to compel people or businesses to move into or remain in the jurisdiction. Cities compete with suburbs in better economic shape and with fewer social needs for the same attractive businesses and residents. Cities may have autonomy in law, but their economic and political power in practice is shaped by private investment decisions.³⁶

31. See, e.g., P. Peterson, *City Limits* 22-37 (1981).

32. See, e.g., S. Elkin, *City and Regime in the American Republic* 36-60 (1987); T. Gurr & D. King, *The State and the City* 57-62, 189-90 (1987); T. Swannstrom, *The Crisis of Growth Politics: Cleveland, Kucinich, and the Challenge of Urban Populism* 136-53 (1985); see also text at notes 278-291 *infra* (discussing mobility of business and residents as a constraint on ability of cities to pursue progressive social agendas).

33. See, e.g., *Abbott v. Burke*, OAL Dkt. No. EDU 5581-85, Agency Dkt. No. 307-8/85 (Aug. 21, 1988), *rev'd*, C.37-89 (Comm'r of Educ. Decision, Feb. 22, 1989), *aff'd*, SB Dkt. No. 12-89 (State Board of Educ., Apr. 13, 1989) at 254-73, *cert. granted*, 117 N.J. 51, 563 A.2d 818 (1989) (describing high taxes and depressed financial and economic circumstances of New Jersey's major cities); see generally J. O'Connor, *The Fiscal Crisis of the State* (1973) (state revenues lag behind expenditures).

34. See, e.g., S. Elkin, *supra* note 32, at 90-95; J. Logan & H. Molotch, *supra* note 17, at 154-66; P. Peterson, *supra* note 31, at 22-37 (summarizing political effect of zoning and land-use devices).

35. Local taxes and tax abatement programs may, in fact, make very little difference in the ability of local governments to attract industry. See Neenan & Ethridge, *Competition and Cooperation Among Localities*, in *Urban Economic Development*, 27 *Urb. Aff. Ann. Rev.* 175, 188 (R. Bingham & J. Blair eds. 1984).

36. See, e.g., Clarke, *More Autonomous Policy Orientations: An Analytic Framework*, in *The Politics of Urban Development* 105, 107-09 (C. Stone & H. Sanders eds. 1987). This is not to say that cities offer residents and potential migrants no reasons to enter or to stay; but rather that, in the fierce competition for new and existing taxpayers, cities' powers to attract and retain the most sought-after residents and businesses are limited.

By contrast, for affluent or middle-class suburbs, local legal powers are more likely to be sufficient for the satisfaction of local wants. Less burdened by poverty, crime, congestion and physical deterioration than big cities, these localities tend to have lower per capita spending needs, while their tax bases are, per taxpayer, more substantial.³⁷ In addition, local autonomy insulates suburban tax bases from the fiscal needs of city residents.³⁸ To the extent that local resources are inadequate and further growth is required, suburbs find it easier than cities to compete for that growth.³⁹

Moreover, for many suburbs, particularly the more affluent ones, the principal local regulatory goals often are controlling growth and preserving the status quo. Local legal autonomy significantly empowers them in this quest. These suburbs can retain local revenues and use them to maintain local schools, utilize their land-use authority to prevent unwanted local development and resist merger or absorption into poorer central cities or regional governments. As a rule, local legal powers will be more effective in attaining the suburban goals of limiting growth and preserving formal autonomy than in attaining the central cities's goals of intergovernmental assistance and private investment.

Of course, not all suburbs are affluent. The variations in municipal size, wealth and economic structure among and within states defy easy generalization. Poorer suburbs, lacking the commercial or industrial facilities of the cities, are fiscally poor indeed.⁴⁰ More generally, the steady economic expansion and increasing demographic diversity of

37. In the 37 largest Standard Metropolitan Statistical Areas (the Census Bureau's formal term for a metropolitan area), per capita central city expenditures exceeded suburban per capita expenditures by 25% in 1957 and 43% in 1970. W. Colman, *Cities, Suburbs, and States: Governing and Financing Urban America* 52 (1975). In 1970, for the four major regions of the country, city per capita expenditure exceeded suburban per capita expenditure by 48% in the Northeast, 38% in the Midwest, 28% in the South and 26% in the West. *Id.* The tax burden as measured by dividing per capita state and local taxes by per capita personal income shows that in 1970, city residents on average were paying 6.7% of income for state and local taxes compared to only 5% in the suburbs. *Id.*

Unlike most big cities, suburbs are usually able to limit local spending to a relative handful of goods and services, primarily education. For most suburbs, school spending consumes one-half to two-thirds of local budgets while the majority of big city expenditures are for public safety, public health, welfare and physical infrastructure needs that do not exist in many suburbs. See, e.g., *id.* at 51-53.

38. See Briffault, *supra* note 1, at 19-24.

39. The lower tax rates and lower welfare burden, the newer physical infrastructure, the better-financed school systems and the more affluent and family-oriented milieu present a more attractive setting to new taxpaying residents and to business and commercial development. See R. Premus, *Urban Growth and Technological Innovation*, in *Urban Economic Development*, *supra* note 35, at 47, 51 (suburbs more attractive to high technology companies).

40. J. Logan & H. Molotch, *supra* note 17, at 190-91. As the findings in some of the school finance cases demonstrated, the poorest localities in metropolitan areas, as measured by property wealth per child, are often poor suburbs. See, e.g., *Board of Educ. v. Nyquist*, 94 Misc. 2d 466, 486-87, 408 N.Y.S.2d 606, 615 (Sup. Ct. 1978), mod-

the suburbs limits the force of the city-suburb distinction. Suburbia as a whole has become less residential and more socially and ethnically integrated than its traditional image would suggest.⁴¹

Yet in many metropolitan areas the model of an economically declining inner city surrounded by more prosperous suburbs continues to have considerable descriptive power.⁴² Moreover, the increased heterogeneity of suburbia as a whole is usually not matched by a greater diversification *within* particular suburbs. There are now more poor and working-class people, more minorities and more industrial and commercial sites in suburbia. But poorer, working-class or black suburbanites are likely to live in different jurisdictions separate from those inhabited by affluent or white suburbanites⁴³—and legal and political

ified, 83 A.D.2d 217, 443 N.Y.S.2d 843 (1981), modified, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), appeal dismissed, 459 U.S. 1139 (1983).

41. See generally M. Baldassare, *supra* note 22, at 1–45 (discussing national trend toward expansion of, and increased social diversity in, suburbs).

42. The sharpness of the city-suburb gap and the magnitude of the suburban advantage in terms of mean family income, average educational attainment and average occupational status correlates directly with the age of the metropolitan area. The suburbs had higher incomes, more high school graduates and more white-collar workers than the central cities in all 33 metropolitan areas in which the central city had been founded before 1880 and in roughly three-quarters of the metropolitan areas which urbanized between 1890 and 1920. See J. Harrigan, *supra* note 18, at 157–58. In the Standard Metropolitan Statistical Areas founded between 1930 and 1970, the suburbs consistently had a lower percentage of population in poverty, but in half the cases, the central cities had a higher median family income and more high school graduates. *Id.*

A recent study of the Cleveland area found that in 1979, the average family income for Cleveland residents was only 61.5% of that for suburban residents while the poverty rate in Cleveland was nearly five times greater than in the suburbs. See T. Swanstrom, *supra* note 32, at 62.

43. With respect to racial segregation, researchers have found that although the percentage of blacks living in suburbs has increased sharply, “[t]his suburbanization does not seem to have markedly affected the extent of black-white segregation.” Massey & Denton, *Suburbanization and Segregation in U.S. Metropolitan Areas*, 94 *Am. J. Soc.* 592, 593 (1988) (“Once a suburb acquires a visible black presence, it tends to attract more blacks than whites, which leads to neighborhood succession and the emergence of a black enclave.”). Black suburban areas tend to have lower socioeconomic status, higher population density, weaker tax bases, poorer municipal services and higher degrees of debt than white suburbs. *Id.* at 593–94. Although there is considerable regional variation, in some metropolitan areas black segregation is actually greater in the suburbs than in the central cities. See *id.* at 605 (citing Detroit, Michigan, Paterson, New Jersey, and Gary, Indiana). Massey and Denton also found both more suburbanization and less segregation for Hispanics and Asian-Americans. *Id.* at 621–22; see also M. Danielson, *supra* note 24, at 8 (In 1970, almost 90% of the black population in suburban Essex County, New Jersey lived in just three towns, where they composed from 27% to 53% of the population; no other town in the county was as much as seven percent black).

With respect to wealth differences, both the 10 richest and the 10 poorest incorporated communities in America are suburbs. Metropolitan Chicago and metropolitan St. Louis can claim suburbs on lists of both the 10 richest communities of 2500 or more people (Kenilworth, Illinois, per capita income of \$48,950, and Ladue, Missouri, per capita income of \$40,700) and the 10 poorest communities of 2500 or more (Ford

authority is wielded by the governments of particular jurisdictions, not by an amorphous, unincorporated "suburbia."

The schematic presented here—the abstraction of local governments as cities and suburbs—while more concrete and detailed than the notion of local government *tout court* is, of course, still too general to capture the considerable variation within each category.⁴⁴ But the smaller size and greater homogeneity of economic function, class or ethnicity of particular suburbs, in contrast to the relative heterogeneity of most big cities, are critical distinctions with important implications for thinking about local autonomy. The contrast between "city" and "suburb" may be a useful heuristic device, with "suburb" read as a shorthand or surrogate term for a municipality that is more functionally and demographically specialized than the traditional city, is a much smaller fragment of the metropolitan area and has fiscal resources and regulatory authority relatively adequate to its needs. Such municipalities will usually be suburbs, even if not all suburbs fall into this category.

A full consideration of the scope of local government power, then, requires a double reconceptualization—of both "local power" and "local government." Instead of treating "local power" as the right to prevail in direct city-state conflicts, local power should, as noted in Part I, be viewed as emerging out of the standard state practices of delegating revenue-raising, regulatory and expenditure authority to localities and of not interfering with the local exercise of that authority.⁴⁵ Localist values pervade the system and make state legislatures and courts resistant to altering these arrangements in ways that would undermine local independence. As a result, municipalities have considerable *de facto* power to frame local policies and pursue local goals.⁴⁶ "Local government" should be analyzed in terms of the two most important types of localities—large, complex, heterogeneous and fiscally dependent "cities," and smaller, more homogeneous "suburbs" with greater resources and fewer needs.⁴⁷

Heights, Illinois, \$4523, and Kinlock, Missouri, \$5529). See Johnson, *The View from Poorest U.S. Suburbs*, N.Y. Times, Apr. 30, 1987, at A18, col. 2; see also P. Florestano & V. Marando, *The States and the Metropolis* 23 (1981) (although there are rich, middle class and poor suburban residents, "[r]arely are these different income groups found integrated in the same suburban locality. The individual suburban localities are quite homogeneous as to the characteristics of their populations and their basic economic activities."); J. Logan & H. Molotch, *supra* note 17, at 187–99 (presenting a typology of suburbs—"the affluent employing suburb," "the working-class residential suburb" and "exclusive residential towns").

44. Furthermore, there are a large number of local communities that are neither cities nor suburbs.

45. See Briffault, *supra* note 1, at 111–15.

46. See *id.*

47. See, e.g., M. Danielson & J. Doig, *New York: The Politics of Urban Regional Development* 256–59 (1982) (comparing the relative ability of cities and suburbs to use local government powers to achieve local goals).

Cities, as just defined, tend to fare relatively poorly under this system, not because of a lack of legal autonomy, as the argument about city legal powerlessness suggests, but because the scarcity of local resources relative to local needs forces them to turn to external sources for financial support. More generally, the localist values in the system militate against the interests of cities. Legal localism presumes local fiscal self-sufficiency; it provides neither a legal basis for compelling state responsibility to help satisfy local needs when local resources prove inadequate nor a political basis for persuading state legislatures to assume a greater degree of responsibility for local fiscal inadequacy. Furthermore, localism legitimates state inaction, making it more difficult for needy localities to obtain financial support from the state or from more prosperous localities.

Suburbs, by contrast, often do better under this system. The core of local legal autonomy is defensive and preservative, enabling residents of more affluent localities to devote local taxable resources to local ends, exclude unwanted land uses and users and protect the autonomous local political structure that allows them to pursue local policies.⁴⁸ These are precisely the goals of more affluent localities. Local autonomy enables these suburbs to protect their resources from the fiscal needs of nearby cities while securing their independence from involvement in the resolution of urban or metropolitan economic or social problems. Suburbs benefit from the localist values of courts and legislatures that discourage modifications of this highly satisfactory status quo and protect them from outside interference.

Moreover, although most discussions of local authority are limited to the legal relationship between states and local governments, this traditional focus on state-local bipolar conflict is too simplistic a model for analyzing local government law. Local government law must deal not just with disputes between states and localities, but also with conflicts among localities.⁴⁹ Strengthening local autonomy from the states does not benefit all localities, but instead benefits those with the greatest local resources or the fewest public service needs, to the detriment of poorer places. Local power thus can lead to city powerlessness.

48. Swanstrom notes,

Having a tax base more than ample to meet the service demands of a largely middle class population, many suburban governments practice the politics of exclusion, not the politics of growth. They are more concerned with excluding the poor and minorities, as well as dirty industry, than with attracting new investment and residents. Ironically, it is precisely in those cities where growth is least possible that growth politics . . . has its most tenacious hold.

T. Swanstrom, *supra* note 32, at 26.

49. As Elazar points out, most smaller localities, "really do not develop a 'city' outlook in the political arena. As a rule, they align themselves with the so-called 'rural' areas (really a misnomer in the demographic sense today) against the 'big city' in urban-rural conflict situations." D. Elazar, *supra* note 20, at 152-53.

So, too, state power is not necessarily the enemy of local power, and enhancing state power need not injure all localities. For cities unable to meet local needs or suffering from the external effects of actions taken by other localities, the state may be a source of financial assistance or serve as an instrument for controlling other, antagonistic municipalities. States, cities and suburbs form a triangular relationship, in which the states have the potential to regulate interlocal competition, address interlocal inequality and promote local interests on a state-wide basis—although states have, for the most part, preferred to take a passive role, with the result that suburban autonomy goes largely unchecked.

The different kinds of local governments, with their diverse needs and often conflicting concerns, cast real doubt on the utility of “local government” as a category for advancing legal analysis. The political, economic and social distinctions that divide cities from suburbs are as significant as the common legal status that unites them. Suburbs, their differences from the cities and the role of the states in addressing city-suburb conflicts, should be central to the analysis of local government law.

Moreover, suburban development and the development of local government law are closely intertwined. The independence of suburbs and the resulting fragmentation of most metropolitan areas are, in an important sense, the product of local government law, while the emergence of suburbs may have contributed to the evolution of local government law in a direction favoring expansive local powers. Judicial treatment of the suburb as the paradigm local government helps to explain the localist results in many cases, much as the political power of the suburbs contributes to the localism of state legislation. The next two sections elaborate on these themes.

B. *The Suburbs and Local Government Law*

Suburban growth—the emigration of people and businesses from city centers to outlying areas—has been a constant feature of nineteenth and twentieth century American urban history.⁵⁰ The persistent lure of cheaper land and open space, the desire to avoid urban crowding and proximity to people of undesirable classes or ethnic groups and

50. Kenneth Jackson explains that before 1815 most suburbs—in the sense of areas immediately outside a city—were industrial or blue collar slums, the locations of slaughterhouses, tanneries and brothels. See K. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 12–19 (1985). Jackson traces the origin of the modern suburb—the middle class or affluent residential community whose inhabitants earned their livelihood in the city—to the transportation revolution that began in the early nineteenth century. *Id.* at 20–44. The steam engine permitted regular ferry links between New York and its first suburb, Brooklyn. The steam railroad and the horse-drawn street car led to the growth of other new suburbs around New York, Philadelphia and Boston in the period between 1815 and 1840. *Id.* at 35–42. Many of these early suburbs were ultimately absorbed into their central cities. *Id.* at 142–43.

the improvements in transportation and communication technology that freed people and industry from the need to be situated in the city have fueled a steady outward movement. For more than a century, people have moved away from the older sections of cities and opened up new urban neighborhoods while retaining economic ties to downtown.

Growth on the urban fringe, however, does not necessarily mean suburban independence. Indeed, for much of American history, cities followed population growth and extended their boundaries to annex new neighborhoods on the urban fringe, thereby recapturing old residents and adding new ones.⁵¹ The existence of large numbers of legally independent suburbs wielding the powers of municipal corporations is a relatively recent phenomenon. The emergence of autonomous suburbs and their legal and political separation from the city is to an important degree attributable to developments in local government law.

1. *The Authorization of Suburban Independence.* — The localist character of the law of municipal formation, expansion and preservation contributed directly to suburban independence. As noted in Part I, most states have allowed the decisions to incorporate a local government and to expand or to merge municipalities to be made at the local level.⁵² This facilitates the formation of new municipalities outside the major cities. Such an approach to local government formation, was not inevitable; indeed, it was not always the case.

In the early nineteenth century, the states played a different and far more active role in local government formation, participating directly in decisions concerning municipal formation and expansion and creating or declining to create new municipalities one at a time. State policies often favored city expansion, and state legislatures redrew municipal boundaries to increase the territorial scope of the central cities as urban populations and urban economies spread into outlying areas.⁵³

51. Virtually every major city in the United States is substantially larger in area today than when it was first incorporated. Jackson notes that “the adjustment of local boundaries has been the dominant method of population growth in every American city of consequence.” *Id.* at 140. Indeed, if “suburb” is defined solely in reference to the characteristic low-density residential neighborhoods, typified by single-family houses surrounded by yards, and not in terms of separate political existence, then all large cities today have suburbs within their borders. See R. Fishman, *Bourgeois Utopias: The Rise and Fall of Suburbia* 6 (1987).

52. See Briffault, *supra* note 1, at 73–81.

53. The Massachusetts legislature, for example, consolidated the city of Boston with its environs. See J. Teaford, *City and Suburb: The Political Fragmentation of Metropolitan America* 54 (1979). The Pennsylvania legislature expanded the size of Philadelphia to 130 square miles by merging 28 separate local governments into the city, without seeking the consent of any of the affected local residents. *Id.* at 33. Both actions and comparable decisions by other states placed within city limits the people and businesses linked to the central city.

As the nineteenth century progressed, state legislatures withdrew from direct involvement in municipal formation and expansion decisions. The states passed general enabling laws for the incorporation of municipalities, thereby shifting operational decisions concerning local government formation to local actors. State constitutional restrictions on special or local acts, and the adoption of home rule,⁵⁴ further constrained the ability of legislatures to become involved in particular municipal formation or expansion determinations.⁵⁵

The adoption of general incorporation and annexation laws did not mean the end of urban expansion. Some states continued to associate their economic development and prestige with the growth of their largest cities and, accordingly, pursued policies that discouraged the formation of independent suburbs and encouraged cities to add new land as urban populations moved beyond the city limits. Thus, states facilitated annexations of outlying areas by central cities, often allowing larger cities to add land without the consent of the residents of the areas annexed. Between the Civil War and World War I, most of the great cities of the Northeast and Midwest experienced significant territorial growth through annexation or consolidation.⁵⁶ The combined areas of the twenty most populous cities grew by approximately twenty percent per decade between 1870 and 1920.⁵⁷ According to Kenneth Jackson, "[t]he predominant view in the nineteenth century was the doctrine of forcible annexation. No small territory could be allowed to retard the development of the metropolitan community."⁵⁸

Over time the structure of metropolitan development changed. State legislatures liberalized their incorporation laws, moving toward the contemporary criteria of relatively minimal population and area requirements.⁵⁹ State courts often interpreted the remaining restrictions to facilitate the formation of autonomous municipalities on the urban

54. According to Teaford, "[s]ince home rule meant rule by the local authorities and local electorates it also meant a halt to any broader efforts at reorganizing the expanding American metropolis." *Id.* at 38.

55. Between 1870 and 1896, state consolidation and annexation plans for Cincinnati, Denver, Des Moines and Topeka were invalidated by state courts that viewed the plans as unconstitutional special acts. See *id.* at 37 (citing *In re Extension of Boundaries of the City of Denver*, 18 Colo. 288, 32 P. 615 (1893); *State ex rel. West v. City of Des Moines*, 96 Iowa 521, 65 N.W. 818 (1896); *City of Topeka v. Gillett*, 32 Kan. 431, 4 P. 800 (1884); *State ex. rel. Attorney General v. City of Cincinnati*, 20 Ohio St. 18 (1870)).

56. The territory of the 20 largest cities grew 286% between 1870 and 1900. *Id.* at 32. Baltimore, Boston, Chicago, Cincinnati, Cleveland, Detroit, Los Angeles, New York City and Pittsburgh all enjoyed great territorial growth between 1870 and 1930. See Miller, *Municipal Annexation and Boundary Change*, in *The Municipal Year Book 1986* at 72, 78-79 (Int'l City Management Ass'n ed. 1986).

57. See J. Teaford, *supra* note 53, at 77. The increase in big city area was 18% in the 1870s, 26% in the 1880s, 32% in the 1890's, 11% in the 1900s and 26% in the 1910s. *Id.*

58. K. Jackson, *supra* note 50, at 147.

59. See J. Teaford, *supra* note 53, at 6-9.

fringe.⁶⁰ Central city expansion began to tail off, and the number of independent municipalities in metropolitan areas began to grow.⁶¹

Thus, although many states limited local government formation by requiring the existence of an "urban community" as a prerequisite to incorporation,⁶² courts defined "urbanness" and "community" to fit the economic and social characteristics of the emerging suburbs. The traditional notion of the urban center as a closely clustered, internally diverse settlement, spatially separate from other localities, began to give way. The lack of a densely populated urban core, the weakness of the internal ties of commerce, production or culture and the fact that suburbanites earned their livelihoods by commuting to the central city, were treated as products of advances in transportation—such as the automobile, interlocal highways and interurban rail lines—which permitted the diffusion of population, the territorial separation of jobs, homes, culture and recreation and the emergence of wholly residential communities. These new places were neither too rural for urban government nor too much a part of the central city to warrant independent

60. See, e.g., *State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 366, 430 P.2d 122, 128 (1967); *State ex rel. Northern Pump Co. v. So-Called Village of Fridley*, 233 Minn. 442, 447–51, 47 N.W.2d 204, 208–10 (1951); *State ex rel. Burnquist v. So-Called Village of St. Anthony*, 223 Minn. 149, 153–55, 26 N.W.2d 193, 195–96 (1947); *In re Borough of Churchill*, 111 Pa. Super. 380, 382–83, 170 A. 319, 320 (1934); *State ex rel. Stephens v. Odell*, 61 Wash. 2d 476, 482–83, 378 P.2d 932, 936 (1963); *Gotfredson v. Town of Summit*, 7 Wis. 2d 400, 403–04, 97 N.W.2d 189, 191 (1959); *In re Incorporation of the Village of Chenequa*, 197 Wis. 163, 169–72, 221 N.W. 856, 858–60 (1928).

61. See R. Wood, *supra* note 24, at 59. There were 55 municipalities in Cook County, Illinois in 1890 and 109 in 1920. In the New York metropolitan area, the number of separate municipalities rose from 127 in 1900 to 204 twenty years later. *Id.*

62. See, e.g., *State ex rel. Young v. Village of Gilbert*, 107 Minn. 364, 367–68, 120 N.W. 528, 530 (1909); *State ex rel. Childs v. Village of Minnetonka*, 57 Minn. 526, 533, 59 N.W. 972, 974 (1894); *Ascherin v. Milwaukee*, 209 Wis. 645, 653, 245 N.W. 840, 843 (1932). Urbanness—a certain density of population, the close clustering of homes, the mixture of commercial facilities and residences or the existence of a compact urban core—was necessary to justify the costs local government would impose on property owners. An evocative statement of the requirement of a traditional urban community as a prerequisite to incorporation is that of the Florida Supreme Court in *State ex rel. Davis v. Town of Lake Placid*, 109 Fla. 419, 147 So. 468 (1933). The *Lake Placid* court explained:

The city of ancient Rome is the prototype for all municipalities of modern times. The desire to be in close touch with the glitter of social life and political activity [sic] presented problems of overcrowding, bad sanitary conditions, crowding of streets and public places . . . were all problems of the ancient municipia of the Empire of Rome.

These problems arose as the population of the towns or cities increased. So it is apparent that, before the legislative will may operate to establish a municipality, that is to say, to prescribe powers and duties for the governance of towns, villages, or communities, there must be in existence a town, village, or community of people, whose local public interests require, in the orderly processes of government, orderly administration under state authority . . .

Id. at 427–28, 147 So. at 471.

existence; rather they were deemed to possess "suburban character"⁶³ and to be suitable for incorporation.

As the Wisconsin Supreme Court put it in reviewing the proposed incorporation of the Village of Chenequa, an entirely residential community where all the petitioners for incorporation were "substantial business men of good repute" who lived in the village but worked in Milwaukee:

[T]he villages of to-day are unlike the villages of 1848 [when the requirement that villages be urban communities was enacted] in many respects. . . . Many villages adjacent or near large cities are built up for the purpose of the convenience and comfort of the residents who are largely business men of a city, who wish to get away from the noise and rush of the city to the quietude of country life. Such in a large measure was the situation of the people who lived in Chenequa.⁶⁴

Similarly, although the suburbs lacked the population density of traditional cities, and the expanses of unplatted land within suburban boundaries often caused suburbs to resemble rural districts more than urban centers, the legal concept of a city was effectively redefined to include this new form of community. The idea of a town had previously meant "a small assemblage of houses collocated under a regular plan regarding streets and lanes," a Pennsylvania court noted,⁶⁵ but the dispersal of homes and the lack of a town center did not mean that an area was not sufficiently urbanized to be incorporated: "[W]e cannot lose sight of the fact that in the more recent development of rural property adjacent to cities or towns, villages are formed with houses having larger areas surrounding them and the dwellings do not, strictly speaking, form a compact group."⁶⁶ In a suburb, the "large area of land" between the homes "did not prevent the formation" of a municipality.⁶⁷

With dispersed settlement patterns and no requirement of com-

63. *Borough of Churchill*, 111 Pa. Super. at 383, 170 A. at 320.

64. *Village of Chenequa*, 197 Wis. at 168, 170-71, 221 N.W. at 858-59. In a later case the Wisconsin court observed

While it may have been usual and customary fifty years ago, or twenty years ago, for a community to grow around the market or place of employment, school, church and perhaps the village blacksmith due to limitations in the means of transportation, this is not so today. . . . The construction of super highways and the technical improvement in the manufacture of automobiles have made it possible for families to live in one community, be employed in another, and seek recreation in still others.

Golfredson, 7 Wis. 2d at 403, 97 N.W.2d at 191.

65. *Borough of Churchill*, 111 Pa. Super. at 382, 170 A. at 320.

66. *Id.*; see also *State ex rel. Burnquist v. So-Called Village of St. Anthony*, 223 Minn. 149, 151-52, 26 N.W.2d 193, 194 (1947) (where land was "suitable for division into smaller tracts and for use for suburban dwelling," court must note that such "change has been taking place not only in the area included in the village, but also in the surrounding area . . . and the trend in that direction is increasing.").

67. *Borough of Churchill*, 111 Pa. Super. at 382, 170 A. at 320.

mon stores, jobs, schools or social or cultural facilities,⁶⁸ what would bind suburban residents together in “communities”? Some state courts looked to the common desire for public services and public regulatory authority and the common class interests and values of the residents.⁶⁹ Thus, where state law required that the local people “‘mingle’ in business, social, educational, and recreational activities,” an Arizona court found no need for the incorporated area to have a shopping or business district. Instead, the court found that the “mingling” requirement was satisfied since the residents had “similar business interests, professions, and occupations” even though they pursued those interests and occupations separately and outside the community.⁷⁰

To become a municipality, then, an area no longer needed to be a relatively built-up, diverse and economically and socially self-contained unit, set off from other localities by the density of its internal linkages—that is, a city. Instead, the area could be a decentralized, homogeneous, residential district, economically tied to other localities—a suburb. Class homogeneity might remedy the lack of regular patterns of business or social interactions among residents, and the common demands of homeowners for public services and regulatory authority could supply the element of “community” that districts without common business, commercial or cultural institutions would otherwise lack.

Allied to the liberalization of the rules for incorporations were new restrictions on the authority of cities to expand. States banned annexation of incorporated localities or conditioned such annexations on the approval of the voters in the communities sought to be annexed.⁷¹ The changes in incorporation and annexation law together meant that most major cities in the Northeast and Midwest were completely surrounded by incorporated suburbs that could not be annexed without consent.⁷²

68. See, e.g., *State ex rel. Stephens v. Odell*, 61 Wash. 2d 476, 478–81, 378 P.2d 932, 933–35 (1963).

69. See, e.g., *Village of St. Anthony*, 223 Minn. at 152–53, 26 N.W.2d at 195 (1947); *Eden Park Borough Incorporation*, 158 Pa. Super. 40, 43, 43 A.2d 529, 530 (1945); *Village of Chenequa*, 197 Wis. at 171, 221 N.W. at 859.

70. *State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 366, 430 P.2d 122, 128 (1967).

71. See, e.g., 4 E. Griffith, *A History of American City Government* 289 (1974) (“The local veto over boundary changes, on the part of both or all governmental units involved, came to be so rigid that only outside intervention by a higher power could break it.”); see also *Taliaferro v. Genesee County Supervisors*, 354 Mich. 49, 57–59, 92 N.W.2d 319, 323–24 (1958) (invalidating an attempt to incorporate a new city to be composed of the city of Flint and several incorporated suburbs on ground that home rule bars the nonconsensual consolidation or dissolution of a municipality); *P. Florestano & V. Marando*, *supra* note 43, at 67 (“In various states, legislatures passed more restrictive annexation laws, gave up their prerogatives to pass . . . special legislation, and allowed fringe area residents a voice in the process, which usually meant resistance to annexation.”).

72. Changes in the law of incorporation and annexation did not always lead to changes in the pattern of metropolitan area development. Many cities continued to expand through annexation even after suburban consent was required. See *infra* note 83. Suburban votes on annexation proposals were influenced by changing suburban percep-

As a result, those cities simply stopped growing as the residents of adjacent areas incorporated and vetoed annexations.⁷³

Proposals to make city boundaries congruent with the territorial scope of metropolitan areas through the consolidation of central cities with their surrounding counties were also conditioned on voter approval. Suburban voters blocked proposed city-county consolidations involving Cleveland, St. Louis and other cities.⁷⁴ In many Northeastern and Midwestern states, city-county consolidation, like annexation and the merger of municipalities, long ago ceased to be a viable means of central city expansion due to the power of suburban voters to veto measures that threatened their local legal autonomy.⁷⁵

The pattern of urban growth through territorial expansion persisted longer in the South and West. State annexation and consolidation laws in the Sunbelt continued to facilitate the growth of major cities and curb the formation of suburbs during the middle years of the twentieth century.⁷⁶ Much of the explosive population growth since World War II of cities like Dallas, Houston, San Antonio, Phoenix and Oklahoma City is attributable to the cities' legal authority, under the liberal annexation laws of their states, to add hundreds of square miles of new land.⁷⁷

tions of the relative advantages and disadvantages of merger with the central city. These issues are discussed more fully in subsections 2 and 3 of this section, *infra*.

73. St. Louis and Philadelphia added virtually no new territory after 1870; New York City, Chicago, Detroit, Baltimore, Cleveland, Boston and Pittsburgh added little or no new territory after 1930. See K. Jackson, *supra* note 50, at 140.

74. See P. Florestano & V. Marando, *supra* note 43, at 70–73. These results seem to have cast a permanent pall over city-county consolidation efforts in the Northeast and North Central states. A recent study of city-county consolidations proposed during the three decades between 1945 and 1976 found that no proposals at all were put before the voters in the Northeast, and only four went before the voters in the Midwest—and all four were defeated. By contrast, there were 64 proposals in the South and West, of which 17, or a little over 25%, passed; all those passing were restricted to small or medium-sized cities. No consolidation involving a city with a population greater than 250,000 has received voter approval since World War II. See *id.* at 70–74.

75. The result of increasing suburban power to block city expansion has been to bring city expansion to a halt. See authorities cited *supra* note 71; K. Jackson, *supra* note 50, at 149. Jackson observes that those large cities now losing population typically expanded rapidly from 1870 to 1930, but have grown “less than 10 percent since 1930.” *Id.*

76. Of the 12 largest cities that gained population between 1950 and 1980, all had also gained territory. These cities were predominantly in the Sunbelt, and included Dallas, Los Angeles, San Antonio, San Diego and San Jose. Of the 12 largest cities that lost population in the same period, 6 had gained no territory and 5 gained only 5 square miles or less. These cities were predominantly in the Northeast and Midwest. See *id.* at 139–40.

77. Between 1940 and 1984, Dallas grew by nearly 291 square miles, Houston by nearly 493 square miles, Phoenix by nearly 377 square miles and San Antonio by 242 square miles; Oklahoma City grew by 553 square miles between 1950 and 1984. See Miller, *supra* note 56, at 78–79; see also C. Abbott, *The New Urban America: Growth and Politics in Sunbelt Cities* 52–54 (rev. ed. 1987).

More recently, legislatures in some Sunbelt states have begun to emulate their Northern and Eastern counterparts by curtailing big city expansion and permitting increased suburban independence. Thus, Texas responded to suburban concerns by amending its liberal annexation laws to restrict the opportunities of larger cities to acquire new territory without the consent of the residents of the areas annexed.⁷⁸ In Georgia, residents of Atlanta's suburbs have blocked that city's annexation of new territory and rejected a consolidation of Atlanta with Fulton County.⁷⁹ In Colorado, suburban resistance to Denver's growth prompted a succession of defensive incorporations by adjacent communities, the adoption of a constitutional amendment requiring a county-wide referendum on any new annexations and suburban rejections of proposals to strengthen the county government.⁸⁰ Oregon created local government boundary commissions⁸¹ primarily to constrain Portland's annexation program.⁸²

Changes in local government law have thus been critical in determining whether large cities will be able to expand to follow outward population movements or whether new urban neighborhoods will be able to declare their independence and become autonomous suburbs. In this century, state laws have tended to favor suburban independence, particularly in the Northeast and Midwest and increasingly in the South and West as well.

2. *Incentives to Suburban Independence.* — The legal right to become independent, and to prevent absorption into a larger city, is a necessary but not a sufficient condition for suburbs to choose autonomous government. Historically, even after states conferred on suburbanites the right to veto annexation, many residents of outlying districts still consented to annexation proposals.⁸³ Suburban independence required a

78. Tex. Local Gov't Code Ann. § 43.022 (Vernon 1988). See Ashcroft & Balfour, Home Rule Cities and Municipal Annexation in Texas: Recent Trends and Future Prospects, 15 St. Mary's L.J. 519, 526, 545 (1984) ("[S]uburban residents, many of whom reside within the [extra-territorial jurisdiction] of major central cities, have become increasingly active in initiating changes to curb the annexation power of home rule cities . . .").

79. See C. Abbott, *supra* note 77, at 197; see also Smothers, Atlanta Still on a Roll, But New Doubts Arise, N.Y. Times, July 14, 1988, at A21, col. 1 (population of the city of Atlanta dropped by 12% from 1974 to 1987 while surrounding metropolitan area grew by 40% from 1970 to 1983).

80. See C. Abbott, *supra* note 77, at 192-95.

81. Or. Rev. Stat. § 199.425 (Butterworth 1983).

82. C. Abbott, *supra* note 77, at 198-200. In Oregon, each of the two local government boundary review commissions has jurisdiction over one of the state's two principal metropolitan areas, Portland and Eugene. Or. Rev. Stat. § 199.425 (Butterworth 1983). In reviewing annexations, the Portland area commission's "major interest is the effect of annexation on the cost and efficiency of service delivery, a criterion that relegates central city desires for increased tax base or population diversification to second place." C. Abbott, *supra* note 77, at 199-200.

83. See J. Teaford, *supra* note 53, at 61 (between 1850 and 1909, all eight annexations Cleveland proposed were approved by the voters in the areas to be annexed; be-

shift in the relative balance of incentives to autonomy and disincentives to annexation. This shift had two major components: the increased economic and social segmentation of metropolitan areas and the increased regulatory authority of local governments over local land use.

a. *Metropolitan Economic and Social Segmentation*. — Local independence carries with it the power to elect local officials, enact local laws, levy local taxes and spend locally raised revenues on local programs. This legal meaning of independence was relatively constant during both the era of urban expansion and the subsequent period of suburb formation, although the spread of home rule enhanced local powers in the later period. But suburban political autonomy, and the concomitant escape from the politics, legislation and taxes of the central city, took on new significance as industrialization and immigration introduced deep class and ethnic differences between territorially defined districts within the urban community.

As the late nineteenth century cities filled with poor immigrants who eventually won urban political power, the older stock of Americans living in outlying areas, aware of the economic and social gap between themselves and city-dwellers, grew resentful of the new ethnic groups' dominance. They came to associate the cities with foreigners, crime, vice and political corruption.⁸⁴ Fearing the emergent urban political machines, suburban residents began to reject annexation, preferring political autonomy in their own communities to minority status in the immigrant cities.⁸⁵ Ethnic differences continue to be felt in the twenti-

tween 1887 and 1898, 12 of 16 annexations Chicago proposed were approved by the local voters).

84. A mid-twentieth century decision of the Illinois Supreme Court, sustaining a state law that provided certain benefits for police officers in Chicago but not in other municipalities, nicely captures this view of the city. The court held that the Illinois General Assembly could reasonably conclude that a policeman's job in the city of Chicago is fraught with hazards uncommon to any other city in Illinois. . . . [A] conscientious study and survey of conditions in Chicago . . . would doubtless reveal congestion in travel, both pedestrian and vehicular, causing an uncommon number of automobile accidents; blight and slum areas; areas of unassimilated foreign elements where crimes are bred and protection is offered to fleeing criminals; skid rows where poverty, crime and general disrespect for the law abounds; narcotic rings, hoodlums, gangsters, and racketeers that kill with sawed-off shotguns, all of which pose problems in Chicago that are not found in other parts of Illinois.

Gaca v. City of Chicago, 411 Ill. 146, 154–55, 103 N.E.2d 617, 622 (1952).

85. See K. Jackson, *supra* note 50, at 150–51 (racial, ethnic and class distinctions most important reason why incorporated suburbs are separated from cities); J. Teaford, *supra* note 53, at 10–12, 82–85. City-suburb ethnic and class differences have policy as well as political ramifications that may also have encouraged suburban incorporation and resistance to annexation.

One point of Yankee-immigrant conflict at the turn of the century was the sale of alcohol: prohibition was generally supported by older stock Americans and opposed by some immigrant groups. Before the national adoption of prohibition, numerous suburbs were incorporated to permit local residents to deny licenses to saloons and ban the sale of alcohol within municipal limits. According to Teaford, Pasadena, Monrovia,

eth century, as white communities have sought to incorporate, pursue annexation programs or resist annexations in order to avoid a political combination with minority areas.⁸⁶

Widening interlocal economic differences, and the right of localities to set their own property tax rates and retain locally raised revenues, provided further incentives to independence. The turn of the century was a period of substantial urban spending on physical infrastructure and social welfare programs, with the result that municipal taxes and debt increased.⁸⁷ Although initially the high quality of urban services attracted residents of outlying areas to annexation by the central city, over time the suburbs became wealthier and better able to fund their own infrastructure and services while they resisted paying high city taxes for redistributive social welfare programs with limited suburban benefit.⁸⁸ Local suburban wealth, and the desire to avoid city

Pomona and Compton in California and Oak Park and Berwyn in Illinois were all incorporated so that residents could ban liquor. See J. Teafor, *supra* note 53, at 17–18. Jackson quotes from an antiannexationist editorial in the *Morgan Park Post*, a suburban Chicago weekly in 1907: “‘The real issue is not taxes, nor water, nor street cars—it is a much greater question than either. It is the moral control of our village.’” K. Jackson, *supra* note 50, at 151; see also J. Bollens & H. Schmandt, *The Metropolis: Its People, Politics and Economic Life* 80 (3d ed. 1975) (describing an 1893 advertisement on behalf of the suburb of Wauwatosa, Wisconsin, which described the town as a place of “fine churches, street lights, transit facilities, and freedom from saloons and heavy industry”).

Occasionally, a suburb was incorporated to authorize a looser approach to vice, as in the incorporations of Arcadia, California and North Randall, Ohio to permit the operation of racetracks. J. Teafor, *supra* note 53, at 18–20. Similarly, a report to the Minnesota legislature in 1959 noted the incorporation of a village for the sole purpose of enabling the sponsors to obtain a liquor license. Under Minnesota law, a license could not be granted in an unincorporated area. See S. Sato & A. Van Alstyne, *State and Local Government Law* 48 (2d ed. 1977).

Today, suburbs may incorporate to pursue more vigorous programs of environmental protection or to establish greater controls on growth than the central city is likely to approve. See R. Babcock & C. Siemon, *The Zoning Game Revisited* 95–118 (1985) (Sanibel, Florida incorporated so that residents could adopt a growth control plan); cf. *Wilson v. Hidden Valley Mun. Water Dist.*, 256 Cal. App. 2d 271, 63 Cal. Rptr. 889 (1967) (formation of a water district).

86. See, e.g., *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); *Taylor v. Township of Dearborn*, 370 Mich. 47, 120 N.W.2d 737 (1963); *Village of Inkster v. Wayne County Supervisor*, 363 Mich. 165, 108 N.W.2d 822 (1961); *Marshall v. Mayor of McComb City*, 251 Miss. 750, 171 So. 2d 347, cert. denied, 382 U.S. 836 (1965); *In re Incorporation of Bridgewater*, 87 Pa. Commw. 599, 488 A.2d 374 (1985); *NAACP v. Town of Hilton Head*, 287 S.C. 254, 335 S.E.2d 806 (1985); Symposium, *The White Curtain: Racially Disadvantaging Local Government Boundary Practices*, 54 U. Det. J. Urb. L. 679 (1977) (use of local governments' powers over boundaries to disadvantage racial minorities).

87. See generally J. Teafor, *The Unheralded Triumph: City Government in America, 1870–1900*, at 217–306 (1984) (discussing provision and financing of high levels of services by cities in late nineteenth century).

88. Some suburbs incorporated as tax havens. This practice was developed by industry, which needed larger parcels of open land for factories, but had no need for social

taxes, formed part of the case for suburban incorporation.

b. *Suburban Autonomy and Local Land Use Regulation*. — The opportunity to escape the politicians, policies and taxes of the central cities made local independence attractive, but it may not be a coincidence that the critical shift in the Northeast and Midwest from urban expansion to suburban incorporation after World War I occurred concurrently with the widespread adoption, and judicial affirmation, of state legislation authorizing local zoning.

Local zoning and the emergence of independent suburbs are closely linked. Although local zoning was first developed in the major cities in response to increasing urban congestion,⁸⁹ within a few years after the landmark Supreme Court decision in *Village of Euclid v. Ambler Realty Co.*,⁹⁰ zoning had spread rapidly to the suburbs, where congestion was rarely a problem.⁹¹ Instead, zoning in the suburbs was a solution to concerns about neighborhood stability. Zoning became a legal device critical to suburban development.

Suburbanites, like the residents of the cities they left behind, were threatened by uncertainties created by the financial, social and racial dynamics of urban expansion. As relatively new communities, suburbs

services and no desire to fund the programs of the big cities. The minimal population requirements for incorporation were readily satisfied and businesses and the small number of area residents could enjoy substantial freedom from urban taxation. In the late 1950s, California's City of Industry contained a few hundred residents but substantial industrial and commercial properties. By 1970, the town contained hundreds of industrial establishments with tens of thousands of employees, but still only a few hundred residents. See Hoch, *City Limits: Municipal Boundary Formation and Class Segregation*, in *Marxism and the Metropolis* 101, 111-12 (W. Tabb. & L. Sawers 2d ed. 1984). Similarly, Forest View, Illinois is an "enclave of industrial riches" with dozens of plants, fewer than a thousand residents and a tax rate one-third of Chicago's, but local expenditures per resident four times as high as Chicago's. See Bravin, *Forest View Asserts Independence as an Enclave of Industrial Riches*, *Chicago Tribune*, July 27, 1986, § 3, at 1, col. 1.

Taxes were initially less of a factor in the formation of residential suburbs since the local desire to keep down taxes was counterbalanced by the need for urban services. It was often cheaper for residents of outlying areas to join the cities and receive extensions of city water systems, sewers and power lines than it was for them to finance their own utilities. See J. Teaford, *supra* note 53, at 58.

89. See generally S. Toll, *Zoned American* (1969) (discussing rise of zoning); Baker, *Zoning Legislation*, 11 *Cornell L.Q.* 164, 165-68 (1926) (describing zoning as solution to variety of problems arising from rapid and unplanned growth of American cities).

An important goal of early zoning advocates was the prevention of nuisance in the crowded, rapidly growing and largely unplanned cities through the separation of inconsistent land uses into distinct areal zones. Zoning was seen as mandated by the exigencies of urban life, particularly the need to restrict polluting industries and control the height and bulk of the new skyscrapers to maintain habitable residential districts. See H. McBain, *American City Progress and the Law* 92-123 (1918).

90. 272 U.S. 365 (1926). Euclid was a suburb of Cleveland.

91. See Danielson, *supra* note 24, at 50 (more than half of suburbs with populations greater than 5000 had power to zone, as did half of suburbs with populations less than 5000).

were particularly risky sites for investment since there was little prior history of local development from which projections of future growth could be made. Some suburbs sought to maintain their exclusive character through deed restrictions and restrictive covenants,⁹² but the costs of persuading all landowners in a community to accept and abide by private controls on sales and development meant that relatively few communities could rely on private agreements as a long-term guarantee of neighborhood stability.

Zoning provided a solution. By precluding undesirable changes in land use and providing a firm basis for predicting the future physical and social evolution of the community, zoning reduced the risks to investors in urban real estate.⁹³ As a political rather than a private act, zoning required the approval of only a majority of residents, not the unanimous consent of all property-owners. Moreover, given the consistent state practice of delegating zoning authority to local governments with little or no state supervision, zoning was a local solution. Zoning ordinances could be closely tailored to the preferences of local residents.⁹⁴ However, zoning did require the legal existence of a local government. Suburban "[r]esidents perceived incorporation as a means of neighborhood protection[]"⁹⁵ and many incorporated in order to zone.⁹⁶

92. See, e.g., T. Swanstrom, *supra* note 32, at 65–66 (discussing role of deed restrictions in development of Shaker Heights, Ohio).

93. See generally C. Perin, *Everything in Its Place: Social Order and Land Use in America* 149–61 (1977); White & Wittman, *Long-Run Versus Short-Run Remedies for Spatial Externalities: Liability Rules, Pollution Taxes, and Zoning*, in *Essays on the Law and Economics of Local Governments* 13, 42 (D. Rubinfeld ed. 1979) (noting that zoning, by reducing uncertainty, removes from individual landowners the burden of forecasting land use changes in the neighborhood).

94. Zoning spread rapidly in exclusive residential suburbs. Late nineteenth and early twentieth century suburbs were relatively affluent for technological reasons. Before the widespread use of the automobile and the construction of a highway system, commuting to the city was largely restricted to rail systems and was relatively expensive. Consequently, when, after World War I, the mass production of the automobile and state investment in new roads led to rapid suburban growth, the most affluent suburbs may have felt particularly threatened. They responded by adopting zoning ordinances with alacrity. See Toll, *supra* note 89, at 192–93. Zoning's capacity for exclusion was its major selling point. See Makielski, *Zoning: Legal Theory and Political Practice*, 45 U. Det. J. Urb. L. 1, 5 (1967).

95. Hoch, *supra* note 88, at 114.

96. See, e.g., R. Babcock & C. Siemon, *supra* note 85, at 95–100; see also S. Toll, *supra* note 89, at 188–96 (describing the interaction and spread of zoning and suburbanization in 1920s); R. Wood, *1400 Governments* 93–95 (1961) (describing the role of zoning in development of suburban Westchester County, New York in 1950s).

Suburbs have incorporated so that the residents could exclude industry, low-cost housing, apartment houses and public housing or adopt growth control plans. See, e.g., *United States v. City of Black Jack*, 508 F.2d 1179, 1182 (8th Cir. 1974) (incorporation to exclude subsidized housing); R. Babcock & C. Siemon, *supra* note 85, at 95–106 (discussing incorporation of Sanibel, Florida as part of local growth control strategy); see also *Marcus v. Baron*, 84 A.D.2d 118, 119–22, 445 N.Y.S.2d 587, 590–91 (1981), *rev'd*,

Moreover, much as the authority to regulate local land use provided a powerful incentive to suburban independence, the emergence of the independent residential suburb may have contributed to the judicial endorsement of local exclusionary practices. A defining characteristic of the suburb is that it is only a small piece of a larger metropolitan region. This was noted by courts in the incorporation cases, as they redefined the notion of an urban community to fit outlying residential neighborhoods composed of people who commute to work in other jurisdictions.⁹⁷ In the zoning cases, the limited size and residential character of the suburb proved to be a justification, not an obstacle, for affirming local power to reject particular land uses. Some courts adopted a perspective that saw the region, and not the particular municipality, as the proper focus of land-use planning, allowing suburbs to exclude lawful land uses on the assumption that, since the people or businesses displaced by restrictive suburban zoning could find sites elsewhere in the region, no "exclusion," in the regional sense at least, had occurred at all.

Thus, in the leading case of *Duffcon Concrete Products, Inc. v. Borough of Cresskill*,⁹⁸ the New Jersey Supreme Court upheld Cresskill's total exclusion of heavy industry by treating the town as a mere residential fragment of a broader regional economy. The Court would not rely on "the adventitious location of municipal boundaries"⁹⁹ to bar Cresskill from excluding industry since the region's industrial needs could be satisfied by an all-residential Cresskill and factories elsewhere.¹⁰⁰ In effect, Cresskill could turn itself into a residential "zone" as part of the balanced development of the region.

Similarly, a federal court, relying on Ohio law, adopted a comparable "regional" perspective in sustaining the total exclusion of industry from the residential town of Valley View: "Traditional concepts of zoning envision a municipality as a self-contained community with its own residential, business and industrial areas,"¹⁰¹ wrote future United States Supreme Court Justice Potter Stewart, then a judge of the United States Court of Appeals for the Sixth Circuit.

It is obvious that Valley View, Ohio, on the periphery of a large metropolitan center, is not such a self-contained community, but only an adventitious fragment of the economic and

57 N.Y.2d 862, 442 N.E.2d 437, 456 N.Y.S.2d 29 (1982) (town of Ramapo, New York adopted a local law restricting the incorporation of villages within the town in order to protect the town's growth control program); Foderaro, *Neighbors Try to Secede Over Housing Plan*, N.Y. Times, Dec. 5, 1988, at B1, col. 2 (attempt to incorporate village in order to zone to prevent implementation of county plan to build housing for homeless in the area proposed for incorporation).

97. See *supra* notes 62-70 (collecting cases).

98. 1 N.J. 509, 64 A.2d 347 (1949).

99. *Id.* at 515, 64 A.2d at 350.

100. See *id.*, 64 A.2d at 351.

101. *Valley View Village, Inc. v. Proffett*, 221 F.2d 412, 418 (6th Cir. 1955).

social whole. . . . The council of such a village should not be required to shut its eyes to the pattern of community life beyond the borders of the village itself [but has the authority] to pass an ordinance preserving its residential character, so long as the business and industrial needs of its inhabitants are supplied by other accessible areas in the community at large.¹⁰²

Since Valley View and Cresskill were not self-contained cities, but only pieces of economically and socially diverse metropolitan areas, they did not have to make room within their borders for all legitimate land uses. Zoning, which initially sought the separation of inconsistent uses within a jurisdiction but not the total exclusion of otherwise lawful land uses, was transformed to permit a community, separated only by "invisible municipal boundary lines"¹⁰³ from the rest of the region, to maintain itself as an exclusively residential place. By enabling suburban residents to reap the benefits of easy access to industrial or commercial opportunities in other jurisdictions without having to provide any land for locally undesirable land uses, these decisions mirrored suburban growth patterns and the suburban assumption that such residential communities were a natural, indeed a beneficial, development. The cases ratified the emergence of all-residential communities, treated them as typifying local government, and then relied on the all-residential model to sustain local legislation intended to mandate and continue that all-residential character.

The regional perspective taken by the courts in the *Cresskill*, and *Valley View* cases, and elsewhere¹⁰⁴ is paradoxical. If the region is the proper focus of planning concerns, why are individual localities empowered to zone at all? With each of the many local governments in a region zoning on the basis of its own interests, what guarantee is there that land uses and land users displaced from one community will find a place elsewhere in the region? More fundamentally, if a particular suburb is no more than a mere fragment of a larger community, set off from its neighbors by "adventitious" boundaries, why should its regulations enjoy the presumption of political legitimacy accorded urban governments without greater supervision by the state or coordination with other localities?¹⁰⁵

102. *Id.*

103. *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 247, 104 A.2d 441, 446 (1954).

104. See, e.g., *Town of Los Altos Hills v. Adobe Creek Properties, Inc.*, 32 Cal. App. 3d 488, 502-03, 108 Cal. Rptr. 271, 282 (1973).

105. Courts have on occasion relied on the regional perspective to limit local autonomy when the actions of one locality impinged on another, thereby limiting the second locality's autonomy. For example, some courts have allowed a neighboring community, or its residents, to challenge a local zoning action and to have the neighbor's interests taken into account. See, e.g., *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 546-49, 492 P.2d 1137, 1139-42, 99 Cal. Rptr. 745, 748-50 (1972); *Township of*

During the postwar suburban boom, these questions were not addressed, let alone answered. Courts treated suburbs as autonomous municipal governments for purposes of providing legitimacy to local regulatory authority, yet also as "suburbs," that is as mere "adventitious fragments" of a larger, integrated metropolitan economy, in order to sustain local exclusionary policies. The regional perspective provided municipalities with a shield for local exclusionary actions but did not subject them to attack for failure to take regional interests into account. The metropolitan areas surrounding a Cresskill or Valley View might be seen as the appropriate "community at large" justifying a local decision to make the suburb a residential preserve, but, until recently, the argument that a community had to accept land uses it deemed undesirable in order to satisfy regional needs was generally rejected.¹⁰⁶ Even now, as the discussion in Part I evidences, regionalism has had only a limited effect in constraining local zoning autonomy.¹⁰⁷

Nor was suburban land-use policy limited to the advancement of residential communities in general; instead, many suburbs had a very specific type of residence in mind. The emerging affluent suburbs of the postwar period regularly excluded not just commercial and industrial facilities, but apartment houses, other multifamily dwellings, and publicly subsidized housing. Courts in the period of rapid suburban growth accepted the suburban model of development and sustained local ordinances that lumped together apartments and other multifamily dwellings with industrial or commercial uses and excluded them from the locality as threats to the local residential character.¹⁰⁸ In a large city this would be a bizarre definition of "residential," yet in the suburbs the assumption that apartment houses were not homes went

Washington v. Village of Ridgewood, 26 N.J. 578, 584-86, 141 A.2d 308, 311-12 (1958); *Borough of Dumont*, 15 N.J. at 245-49, 104 A.2d at 444-47.

But these cases typically have involved actions by the zoning community to permit an industrial or commercial development or the construction of multifamily housing adjacent to a single-family residential district of the protesting second community. Ordinarily local autonomy and the local preference for a residential community go hand in hand and the regional perspective operates to reinforce both autonomy and the exclusion of nonresidential uses. However, when local action threatens the residential nature of an adjacent community, the judicial vision of municipalities as residential communities permits one community to use the regional perspective to limit the autonomy of another. Of course, even here the effect of the regional perspective is to deny a nonresidential use rather than curb the residential preference.

These cases of interlocal conflict aside, courts generally have not questioned the municipality's power to zone or its right to base its zoning decisions on the best interests of the municipality.

106. See, e.g., *Fanale v. Borough of Hasbrouck Heights*, 26 N.J. 320, 328, 139 A.2d 749, 754 (1958).

107. See Briffault, *supra* note 1, at 39-58.

108. The New Jersey Supreme Court commented, "Apartment houses are not inherently benign" and their exclusion helped a community "retain its residential character." *Fanale*, 26 N.J. at 325-26, 139 A.2d at 752.

unchallenged.¹⁰⁹

The large-lot zoning decisions also suggest the power of the suburban model in transforming the concept of the city from a place of people and buildings clustered tightly together, separated from the country and characterized by the congestion of its streets and public places and the intensity of its street life,¹¹⁰ to a setting of individual homes, surrounded by large amounts of privately owned open space with people living their lives relatively separate from their neighbors.¹¹¹ Although large-lot zoning was justified, in part, by economic considerations,¹¹² the judicial legitimization of exclusionary practices appears also to indicate a belief that large lots and large homes were constitutive of the character of suburban areas.¹¹³

As in the incorporation cases, decentralized settlement ceased to raise questions about an area's urban character. To the contrary, the separation of homes from each other became an appropriate goal of urban residential development. Courts referred to the "quiet and

109. Constance Perin links the suburban hostility to apartment houses to the general suburban insistence on the separation of work from home. As apartment units are typically rented and not owned, apartment houses combine aspects of business with residence. This results in the intrusion of the "profanities of work and commerce" into the "sacred aura of family." C. Perin, *supra* note 93, at 116–18.

110. See, e.g., K. Jackson, *supra* note 50, at 14–16.

111. Perin sees the residential "flight to the suburbs" and the suburban preference for single-family detached houses as similar expressions of strategies of social avoidance. Both the removal from the densely populated city and the meticulous detail in many suburban zoning ordinances governing the size of lots and back, front and side yards are mechanisms for reducing intrusions into residents' personal space. So too, zoning measures designed to achieve income homogeneity are aimed at avoiding social conflict and promoting "domestic tranquility." See C. Perin, *supra* note 93, at 81–98.

112. Courts have recognized that the home is the principal asset of most suburban residents, and that by keeping down the demand for local public services and keeping up the cost of new homes, large-lot zoning protects property values. See, e.g., *Flora Realty & Inv. Co. v. City of Ladue*, 362 Mo. 1025, 1036, 246 S.W.2d 771, 776 (en banc) ("[A] reduction of the minimum area restrictions . . . would have a materially adverse effect on the value of all the property in the general vicinity."), appeal dismissed, 344 U.S. 802 (1952).

Indeed, large lot requirements not only serve residents' individual interests, but, since suburban communities are composed largely of homeowners, the protection of property values serves the community as a whole. See, e.g., *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 174–75, 89 A.2d 693, 697–98 (1952), appeal dismissed, 344 U.S. 919 (1953); *Clary v. Borough of Eatontown*, 41 N.J. Super. 47, 60, 64, 124 A.2d 54, 61, 63 (App. Div. 1956).

113. Some courts that plainly were troubled by the economically exclusionary potential of large-lot regulations nevertheless were willing to sustain these costly mandates, and the allied requirements concerning large building frontages and large floor areas, because they found them to be consistent with the proper social development of the suburbs. See, e.g., *Simon v. Town of Needham*, 311 Mass. 560, 563–67, 42 N.E.2d 516, 518–20 (1942); see also C. Perin, *supra* note 93, at 164–68 (local motivations to adopt growth controls are cultural as much as fiscal).

beauty of rural surroundings,"¹¹⁴ the "nice homes"¹¹⁵ or "better-type home areas,"¹¹⁶ and the right of the residents to prefer "more land, more living room, indoors and out, and more freedom in their scale of living."¹¹⁷ Suburbs were defined around yards, open spaces, roomy homes, low population density and the lack of urban noise, traffic and congestion. Where once city and country had stood as opposites, with municipal government associated with the former and not the latter, in the suburbs the two were combined. Suburban land-use regulation enabled residents to enjoy the privacy and "blessings of quiet seclusion"¹¹⁸ of country life¹¹⁹ within commuting range of the employment opportunities and cultural amenities of the city. Courts sustained the efforts of developing municipalities to use their zoning powers to preserve the "country" aspects of local life and prevent their transformation into "cities."¹²⁰

Zoning, of course, is not limited to the suburbs. The protection of property values, the preservation of social status and the defense of the psychological and emotional benefits derived from a familiar and dependable environment in the face of a dynamic urban land market are goals of many city residents, too. But city residents have not been as successful in using zoning to produce stable residential neighborhoods. In part, this is a result of timing. By the time zoning became widespread in the 1920s, most of the cities of the Northeast and Midwest were substantially developed. The poor had already settled in these cities in large numbers, and much city land was already devoted to multiunit housing or commercial and industrial uses. Exclusionary zoning can prevent the influx of low-income people and the construction of less expensive housing, but it cannot eject people who are already there or destroy housing that already exists.¹²¹ Zoning is a more effective tool for shaping the future than for dealing with the consequences of the past.

Moreover, zoning is a regulatory device exercised on behalf of the entire polity. In the cities, middle class and affluent residents share power with the poor, the working class and business groups. It may be

114. *Simon*, 311 Mass. at 563, 42 N.E.2d at 518.

115. *Flora Realty*, 362 Mo. at 1036, 246 S.W.2d at 776.

116. *Clary*, 41 N.J. Super. at 67, 124 A.2d at 65.

117. *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 174, 89 A.2d 693, 697 (1952).

118. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

119. *Lionshead Lake*, 10 N.J. at 174, 89 A.2d at 697.

120. The commitment to the pattern of separated settlement goes beyond a concern to keep down population density. Some suburbs have opposed planned unit developments (PUD's) and cluster housing, neither of which would increase density but both of which depart from the detached single-family dwelling that is characteristic of suburban areas. See R. Babcock, *The Zoning Game* 75-76 (1966).

121. Of course, urban renewal and slum clearance programs are an effective means of destroying existing low-income housing and, thereby, excluding low income residents from the city. See, e.g., J. Mollenkopf, *The Contested City* 97-212 (1983).

more difficult for any one group to prevail consistently or to use the legal powers of the city as a whole to protect a particular neighborhood.¹²² In the city, a neighborhood cannot by itself zone to maintain its particular economic and social status quo or control the pace and

122. This is not to deny that white, middle class city neighborhoods can, and often do, dominate municipal housing and zoning decisions to maintain patterns of housing segregation within the city. They may do this, for example, by siting all public or subsidized housing in poor or minority areas. See, e.g., *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988).

Nevertheless, cities are more likely to be called to account for segregative housing practices. Cities are more likely to have minority residents with standing to sue the municipality, whereas in exclusionary suburbs the persons aggrieved by the segregative practices are more likely to be nonresidents, who would probably lack standing. See *Warth v. Seldin*, 422 U.S. 490 (1975), discussed in Briffault, *supra* note 1, at 107-09. Cities, especially poor cities like Yonkers, are more apt to seek federal assistance for public or subsidized housing and become subject to federal statutory and administrative obligations governing the siting of such housing. Suburbs, since they tend to depend less on federal housing assistance, may be sued only under the equal protection clause of the fourteenth amendment or more general fair housing statutes. It may be easier for plaintiffs to demonstrate a city's violations of the conditions for housing assistance than to prove a suburb's violation of the Constitution, since, given the general refusal of suburbs to accept subsidized housing, it is difficult to distinguish racially-motivated exclusionary ordinances from usual local zoning practices. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

Thus, Yonkers, for all its sins, is a city that in 1988 was 11% black, had a median family income of \$28,000, and had 6800 units of low-income housing. By contrast, in the nearby suburb of Hastings-on-Hudson, the population was 3% black, the median income was \$41,000, and there were no units of low-income housing; in the suburb of Scarsdale, the population was 2% black, the median income was \$93,000 and there were no units of public housing; and in the suburb of Bronxville the population was 0.1% black, the median income was \$70,000 and there were no units of low-income housing. See Salins, *A Tale of Racism in the Suburbs*, N.Y. Times, July 28, 1988, at A27, col. 1. Yet, under current law only Yonkers could be sued successfully for discriminatory housing practices.

Moreover, changes in the structure of local legislatures will make it more difficult for cities with any substantial minority population to engage in discriminatory practices against their own residents. Under the 1982 amendments to the Voting Rights Act, 96 Stat. 131 (codified at 42 U.S.C. §§ 1971-1973c (Supp. III 1985)), the Department of Justice and the courts have given close scrutiny to at-large city councils and local apportionment plans that do not result in the election of minority representatives in numbers reflecting the minority share of the local population. See, e.g., *Cruz Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), cert. denied, 109 S. Ct. 1534 (1989); *United States v. Dallas County Comm'n*, 850 F.2d 1433 (11th Cir. 1988), cert. denied, 109 S. Ct. 1768 (1989). With greater minority representation on city councils, the ability of white neighborhoods to dominate municipal housing and zoning decisions should be lessened, and local legislatures should be more attentive to minority interests in a city. By contrast, minority interests will continue to be unrepresented in the local legislatures of all-white suburbs. Those municipal councils are already responsive to local residents' interests; from the perspective of housing integration that is precisely the problem. The only way to reduce segregative actions by suburbs would be to require them to represent the interests of nonresidents—something well beyond the scope of the Voting Rights Act and, for the most part, outside the general strictures of local government law.

direction of future growth. But in the suburbs, a neighborhood, once incorporated, can.¹²³

Zoning, thus, joins political, legislative and fiscal autonomy in providing a legal incentive for suburban incorporation. The emergence of the autonomous suburb was closely intertwined with doctrinal changes in incorporation and zoning law that resulted from suburban growth, much as the development of the suburbs led to changes in the legal assumptions governing the political, economic and social characteristics of municipalities. Local governments and local government law were suburbanized together.

3. *Reducing Disincentives to Suburban Independence.* — The right to incorporate and the expansion of local regulatory authority might not be sufficient to lead a suburban area to incorporate if the suburb's tax base is inadequate to fund basic municipal services.¹²⁴ Indeed, as previously noted, in the late nineteenth and early twentieth centuries, the high quality of city services and the high cost to suburbs of providing equivalent services independently led many suburbs to forego incorporation and accept annexation by the larger cities.¹²⁵

The basic goals of the suburbs—separation from the city and the provision of high-quality municipal services—are in tension.¹²⁶ In the

123. Babcock observes,

The central city is a conglomeration of many neighborhoods, each of which may have as much social and historic unity as the average suburb. The suburb, however, enjoys virtually absolute control over the location, size, style, and characteristics of housing and other land uses, while an equivalent neighborhood in the city has no control whatsoever over its own affairs.

R. Babcock, *Billboards, Glass Houses and the Law: And Other Land Use Fables* 39 (1977); see also Hays, *The Changing Political Structure of the City in Industrial America*, 1 J. Urb. Hist. 6, 27 (1974) (formation of "[s]uburban political units reflected a desire to separate out one's community from the larger urban world").

124. Even today the working-class suburb "is quite likely to be unincorporated. It is cheaper that way . . ." J. Harrigan, *supra* note 18, at 251 (quoting C. Adrian & C. Press, *Governing Urban America* 46 (4th ed. 1972)). In order to preserve their independence from the city, these communities will either take their services from the county or a special district, see *infra* text at notes 128–140, or choose to receive a lower level of services.

125. The major cities were the first localities to create professional police and fire departments, develop extensive school systems, pave streets, sidewalks and roads, create parks and invest in the costly public works necessary to provide water, power and sewage and waste removal. See J. Teaford, *supra* note 87.

Moreover, not only were independent suburban services costlier, but suburban per capita tax bases were smaller. Suburbs may have lacked the inner city's poor, but they were also without the cities' manufacturing and commercial establishments. Even as industry began to move to the suburbs, industrial establishments often concentrated in particular business-oriented communities and were of little direct help in financing infrastructure and services in residential communities.

126. Cf. J. Harrigan, *supra* note 18, at 260 (discussing tension between suburban goals of autonomy, which call for "small-town suburban governments," and the need to supply the infrastructure for growth, such as highways, sewers, water supply, hospitals and schools, which is "too expensive for small-town governments to do on their own.").

nineteenth century relatively few communities could afford to go it alone.¹²⁷ Even as suburban affluence increased and the ethnic and cultural rifts between cities and suburbs widened, reducing the fiscal disadvantages of independence while increasing the perceived social and political price of joining the city, the costs of paying for local services still caused many suburbanites to draw back from incorporation.

New state laws reduced this fiscal disincentive to suburban incorporation in three ways: the creation of new governmental structures which allowed suburbs to combine with each other and with cities in order to fund infrastructure without ceding local political autonomy over other matters, the authorization of intergovernmental contracting and direct financial assistance from the state.

a. *Limited-Purpose Governments*. — Since the turn of the century, state legislatures have invented a “baffling array” of “pseudo governments” to provide infrastructure services to the suburbs without disturbing suburban political autonomy.¹²⁸ These entities—variously christened boards, districts, authorities and commissions—are authorized to construct, operate or finance physical infrastructure services, usually water supply services, sewers, parks or transportation, over an area including many general-purpose governments. These limited-purpose entities can pool the resources of a number of localities in an area, but solely to provide one or a handful of specified services.

Where the board’s jurisdiction includes both the city and the suburbs and the city has already installed its own water supply or sewers out of its own funds, the board effectively redistributes city revenues to the installation and support of suburban services.¹²⁹ Where the board or district includes only developing areas in need of the initial installation of new services, the creation of a single area-wide water or sewer system and the combination of revenues from numerous localities lead to substantial economies of scale, reducing the per capita cost of providing new infrastructure systems but undermining the competitive advantage of the central city and permitting suburbs to enjoy municipal

Harrigan notes that “[i]f the system of autonomous small-town suburban governments was going to be maintained, some mechanisms had to be created to provide those expensive essential services.” *Id.*

127. A harbinger of things to come was the decision in 1874 of the voters of Brookline, the self-styled “richest town in the world,” to reject annexation by Boston—“the first really significant defeat” for big city expansion. K. Jackson, *supra* note 50, at 149. In the preceding decade, Boston had successfully annexed five outlying cities, and, even after Brookline’s rebuff, Boston would again annex areas poorer than Brookline in need of urban services, but Brookline’s action set the future pattern for wealthier suburbs. See *id.* Brookline’s decision had significant effects on the long-term development of the Boston metropolitan area. See M. Edel, E. Sclar & D. Luria, *Shaky Palaces: Homeownership and Social Mobility in Boston’s Suburbanization* 233–63 (1984).

128. R. Wood, *supra* note 24, at 84.

129. See M. Edel, E. Sclar & D. Luria, *supra* note 127, at 60–61.

services without submitting to annexation or consolidation.¹³⁰

The structure and design of these special-purpose units minimize the intrusion on suburban autonomy. First, they are limited-purpose governments. The metropolitan unit overlaps cities and suburbs but has no general governmental authority over the territory or residents within its jurisdiction. Cities and suburbs are not merged, and the city gains no lawmaking authority over the suburbs. Rather, different municipalities are linked only for a particular purpose, such as supplying water or removing wastes.

Second, these units provide services that facilitate separate suburban political existence without disrupting suburban class or ethnic homogeneity. In Oliver Williams's terminology, the metropolitan special districts perform "system-maintenance functions" without impinging on suburban "lifestyles."¹³¹ The physical infrastructure that metropolitan districts provide usually lacks broader implications for the economic or social demography of suburban communities. Special districts supply engineering solutions to technical problems; they do not directly engage in area-wide social or economic policymaking.¹³² Metropolitan districts do not zone or provide police, housing or schools on an area-wide city-suburb basis.¹³³ Suburbs that have accepted regional provision of certain transportation facilities, like airports, have been able to reject other area-wide services, like metropolitan mass transit systems, because of the concern that the latter would increase the ability of central city residents to travel to the suburbs.¹³⁴

Third, special districts' financial and governance arrangements minimize their regional redistributive and political potential. The operation of these agencies is usually funded through service fees or user charges, with local service recipients paying a specified amount for each

130. See, e.g., J. Teaford, *supra* note 53, at 78-81; see generally Schwartz, *Evolution of the Suburbs*, in *Suburbia: The American Dream and Dilemma* 1, 18-21 (P. Dolce ed. 1976) (discussing New York and Philadelphia suburbs' successful opposition to city expansion).

131. Williams, *Life Style Values and Political Decentralization in Metropolitan Areas*, 48 *Sw. Soc. Sci. Q.* 299, 304-07 (1967).

132. See R. Wood, *supra* note 24, at 248.

133. See R. Babcock, *supra* note 120, at 38; Friedland, Piven & Alford, *Political Conflict, Urban Structure, and the Fiscal Crisis*, in *Marxism and the Metropolis*, *supra* note 88, at 273, 285.

134. See C. Abbott, *supra* note 77, at 193, 197 (describing refusal of three suburban Georgia counties to join Atlanta's regional mass transit system and limitation of the functions of Portland's metropolitan service district to solid-waste planning and the zoo); Lineberry, *Reforming Metropolitan Governance: Requiem or Reality*, 58 *Geo. L.J.* 675, 684 (1970) (voters in metropolitan Seattle refused to add mass transit to the functions of metropolitan Seattle public authority previously handling regional sewage disposal); Schmidt, *Racial Roadblock Seen in Atlanta Transit System*, *N.Y. Times*, July 22, 1987, at A16, col. 3 (continued refusal of Atlanta suburbs to join transit system, allegedly due to fear that extension of transit lines will bring more blacks to suburbs).

unit of service they receive. Local tax bases are generally not exposed to the public service needs of the region or of people residing outside local political boundaries.

The metropolitan boards generally lack regional popular political constituencies. Often their members are unelected, and are, instead, appointees or officials of the affected municipalities serving *ex officio*.¹³⁵ The board members do not serve as representatives of a regional electorate, but either represent their home locality to the regional unit—where they vote on a “one government, one vote” and not a “one person, one vote” basis—or they are not locally representative at all. There are few political ties linking metropolitan districts directly to the residents of the metropolitan area, so that these districts do not significantly disturb the existing political alignment of cities and suburbs.¹³⁶

As metropolitan areas have grown, special districts have proliferated. There are now more than 28,000, and the special district is the most common form of local government.¹³⁷ In most areas there are more special districts than municipalities.¹³⁸ At one time, political scientists saw these metropolitan boards and districts as a bridge from local independence to regional government. They predicted that as local governments developed institutions for interlocal cooperation and saw the need for regional solutions to area-wide problems, metropolitan consolidation would follow.¹³⁹ Instead, the opposite has occurred.

135. See, e.g., Friedland, Piven and Alford, *supra* note 133, at 283 (“transportation and industrial development policies are often delegated to agencies . . . whose officials are not elected. . . .”); Shestack, *The Public Authority*, 105 U. Pa. L. Rev. 553, 554–55 (1957); cf. Comment, *An Analysis of Authorities: Traditional and Multicounty*, 71 Mich. L. Rev. 1376, 1380–81 (1973) (“On the whole, there are more elected than appointed officials directing special governments, but the more important authorities are usually governed by appointed directors.”). Moreover, even where special district boards are elected, those elections are, with the exception of school board elections, not subject to the one-person, one-vote rule, so that the electorate is often limited to landowners who are entitled to vote on a “one-acre, one-vote” basis. See, e.g., *Ball v. James*, 451 U.S. 355, 370–71 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 733–34 (1973).

136. See, e.g., M. Edel, E. Sclar & D. Luria, *supra* note 127, at 60–80; R. Wood, *supra* note 24, at 83.

137. In 1982, there were 28,588 special districts, not including school districts; by contrast, there were 19,076 municipalities and 3041 counties. See J. Aronson & J. Hilley, *supra* note 30, at 76. The number of special districts has also grown more rapidly than that of municipalities. Between 1957 and 1982, the number of municipalities rose by 1893; in the same period, the number of special districts increased by 14,183. *Id.*

138. In 1972, the average metropolitan area included 20 municipalities and more than 30 special districts. See W. Colman, *supra* note 37, at 125. In the 31-county New York metropolitan area there were 780 municipalities and 716 special districts. See M. Danielson & J. Doig, *supra* note 47, at 4.

139. See, e.g., Ylvisaker, *Some Criteria for a “Proper” Areal Division of Governmental Powers*, in *Area and Power: A Theory of Local Government* 27, 42–43 (A. Maass ed. 1959); cf. W. Sayre & H. Kaufman, *Governing New York City: Politics in the Me-*

State-authorized limited-purpose governments have provided suburbs with an alternative to annexation, consolidation to the central city or acceptance of full-fledged metropolitan governments.¹⁴⁰ A suburb can maintain political independence, including control of its tax base, schools and lands, while still sharing in the economies of scale provided by infrastructure services organized and funded on a regional basis.

b. *Interlocal Contracts*. — Interlocal contracting provides a second method of solving suburban service delivery problems without forfeiting political independence. In forty-two states, municipalities are authorized to purchase services from other localities.¹⁴¹ Typically, this means that a small suburb can purchase municipal services from a larger suburb, the central city or the county. This permits smaller suburbs to benefit from economies of scale and to pay only for the marginal cost of extending services to a newly developed area rather than the larger, fixed costs of creating entirely new service systems.

As with special districts, interlocal contracts operate on a service-by-service basis. Interlocal contracts are not redistributive; the suburb pays for the cost of receiving the particular service but does not contribute more broadly to the cost of city or county government. A suburb's decision to contract for any one service has no broader implications for interlocal agreements for any other services. Although interlocal contracts often cover a wide spectrum of services, and may include law enforcement, street maintenance and administrative services as well as sewers, water supply and parks and recreation,¹⁴² there are few agreements to provide services with social implications.¹⁴³

Interlocal contracts are even less of a threat to local autonomy than metropolitan special districts. States may create special districts without the express consent of the affected localities, but interlocal contracts are entirely a matter of local option. No locality need enter into a contract with any other. Moreover, while special districts have no fixed term and their bond obligations may guarantee them long lives, interlocal contracts do expire and the decision to renew is, again, a matter of local option. Still less do interlocal contracts entail creation of a regional government. The purchasing suburb contracts with an existing

ropolis 596 (1965) (New York City-area Metropolitan Regional Council's "influence appears likely to increase gradually but steadily in years ahead.").

140. See, e.g., Schwartz, *supra* note 130, at 18–21.

141. See Florestano & V. Marando, *supra* note 43, at 81; see, e.g., Conn. Gen. Stat. Ann. § 7339b (West 1989); Ill. Ann. Stat. ch. 127, ¶ 743.1 (Smith-Hurd 1981 & Supp. 1989); N.J. Stat. Ann. § 40:8A-3 (West 1967 & Supp. 1989);

142. See, e.g., R. Bish, *The Public Economy of Metropolitan Areas* 86–87 (1971).

143. See, e.g., J. Bollens & H. Schmandt, *supra* note 85, at 291–98, 327. The reluctance of local governments to cooperate over issues with lifestyle implications, for example subsidized housing, is illustrated by the refusal of the suburbs of Cleveland to enter into agreements with the regional housing authority to accept subsidized units within their borders. See *Mahaley v. Cuyahoga Metro. Hous. Auth.*, 500 F.2d 1087, 1089 (6th Cir. 1974).

locality; there is not even the minimal danger of a regional entity exercising control over the suburban jurisdiction.

Interlocal contracts, of course, must benefit the central city or county providing the suburb with public services as well as the suburb receiving the service. For some urban governments, interlocal contracts provide a means of employing excess capacity. The extension of city utility services to the suburbs may be an inexpensive means of earning additional revenues. For a city unable to expand by annexation, interlocal contracting is a kind of consolation prize; it permits the city to obtain some financial support from outlying areas, although the revenues received are usually tied to the cost of the services provided and the contractual relationship is likely to result in less redistribution from affluent or middle class suburbs to the central city poor than annexation would have.¹⁴⁴ Moreover, although interlocal contracting takes some of the sting out of the city's inability to annex, it also makes it far more likely that an outlying area will reject annexation.

The most famous elaboration of interlocal contracting as an alternative to annexation is illustrative. In the 1950s Lakewood was a rapidly growing area in Southern California, adjacent to the city of Long Beach. To avoid annexation by Long Beach, an attorney for a local developer, together with county officials, devised a plan whereby the community could incorporate as a city but contract with the county to receive all the county services it had received as an unincorporated area plus additional services necessitated by population growth.¹⁴⁵ Lakewood became the first municipality to exist on the basis of purchasing all of its basic services from another unit of government.¹⁴⁶ The plan assured Lakewood the necessary municipal services while protecting it from being annexed and allowing it to govern itself and exercise its own taxing and police powers, including zoning.

The Lakewood Plan provoked an explosion of incorporation activity in Southern California, with twenty-five additional suburban communities incorporating into separate municipalities between 1954 and 1961.¹⁴⁷ The Lakewood Plan continues to provide a model for suburbs seeking a fiscally feasible method of sustaining political independence. Together with the formation of metropolitan service districts, Lakewood-style contracting provides suburbs with an alternative to joining the central city or agreeing to general governments that span

144. Cities that supply public utility services, such as water and power, to other localities are sometimes subject to the same restrictions as privately owned public utilities. Hence they may not be able to discriminate in pricing these services in favor of city residents unless such discrimination is justified by differences in the cost of providing the service. See, e.g., *City of Texarkana v. Wiggins*, 151 Tex. 100, 104-05, 246 S.W.2d 622, 624-25 (1952).

145. See Hoch, *supra* note 88, at 103.

146. See J. Harrigan, *supra* note 18, at 261-63.

147. See R. Bish & V. Ostrom, *Understanding Urban Government* 60 (1973).

metropolitan areas.¹⁴⁸

c. *Intergovernmental Aid*. — The states also facilitated suburban autonomy by providing funds directly for the construction of suburban physical infrastructure. State programs contributed to the building and maintenance of the highways connecting the suburbs to the cities, the financing of suburban water and sewer systems and the funding of suburban schools.

Highway construction was a major economic activity of state governments in the 1920s.¹⁴⁹ Highways permitted large numbers of middle-class city residents to emigrate to the suburbs while continuing to work in the city, and the extensive state role in highway construction and maintenance in the decades before the federal interstate system relieved the suburbs, which depended on these new roads, from what could have been a severe financial burden.¹⁵⁰

Similarly, the states were actively involved in securing the provision of water supply and sanitary services to the suburbs—functions which the central cities had financed for themselves in prior decades.¹⁵¹ In part, the pattern of state assistance to suburbs with respect to water and sewers was a result of timing. In the nineteenth century, the major cities were far more activist than the states in supplying public goods and services to their residents.¹⁵² The cities were the first governments to develop effective water and sewer systems.¹⁵³ The city systems established new standards of public health and amenity, which, by the twentieth century, came to be considered a governmental obligation. With the rapidly growing areas on the urban fringe often unable to construct or fund their own systems, the more active state governments began to assume some degree of responsibility, either through the formation of special districts, direct state provision or financial aid to suburban localities.¹⁵⁴ The physical facilities that the major cities had funded for themselves were, to a considerable degree, provided for the suburbs through programs of state assistance.

148. For a generally favorable description of the Lakewood Plan, see *id.* at 59–61.

149. See K. Jackson, *supra* note 50, at 166–68 (between 1919 and 1929, every state adopted a motor fuel tax and earmarked the revenue to fund highway construction); Ashton, *Urbanization and the Dynamics of Suburban Development Under Capitalism, in Marxism in the Metropolis*, *supra* note 88, at 54, 63–64; see also J. Aronson & J. Hilley, *supra* note 30, at 240 (table A-6) (in 1927 highways were second only to education as recipients of state and local expenditure); *id.* at 246 (table A-12) (in 1927 one-third of state assistance to local government was for highway construction).

150. See, e.g., Ashton, *supra* note 149, at 63–66.

151. See J. Teaford, *supra* note 87, at 219–27.

152. See Briffault, *supra* note 1, at 15.

153. See *id.*

154. See, e.g., M. Danielson, *supra* note 24, at 283. Federal water, sewer and highway grants also enabled suburbs to grow while remaining independent, without straining local resources. See, e.g., W. Colman, *supra* note 37, at 73–74; K. Jackson, *supra* note 50, at 293; R. Wood, *supra* note 96, at 170.

State school-aid programs were also developed, initially, to enable the suburbs and rural areas to meet the educational standards set by the cities.¹⁵⁵ Because of the lack of industrial and commercial property in most suburbs and the large concentrations of families with children, the capital costs of creating new public school systems placed a major strain on the budgets of the emerging suburbs. Although older, wealthier suburbs were able to carry this burden and offer educational programs comparable to the cities' without state assistance, the newer, less affluent middle-class suburbs of the twentieth century might have been unable to fund school systems internally.¹⁵⁶ State aid formulas generally favored the suburbs, for example, by funding a higher proportion of school construction or pupil transportation costs, which were far more important in the developing, sprawling suburbs than in the older, more concentrated cities.¹⁵⁷ State aid was critical in enabling the newer suburbs to build their schools and start up their school systems. Indeed, from the inception of state school assistance programs until the 1960s, in most metropolitan areas suburbs generally received more aid per pupil than did the central cities.¹⁵⁸

Together, state intergovernmental aid, state authorization of interlocal contracts and state creation of special service districts made suburban independence fiscally feasible and rendered merger with the central city unnecessary. These developments in local government law allowed suburbs to be politically separate from the city and still enjoy high-quality municipal services without bearing unduly burdensome costs.

As a result, even as metropolitan areas have expanded and the localities of a region have become economically intertwined, local governments have grown apart politically. Outside the central cities, the imaginary lines separating neighborhoods of different classes or ethnic groups are also political boundaries, setting off self-governing municipalities. The rise of autonomous suburbs has had profound implications for the political structure of most metropolitan areas. Moreover, by providing a new model for thinking about local government, the

155. See, e.g., S. Sacks, *City Schools/Suburban Schools: A History of Fiscal Conflict* 57-58 (1972).

156. See Williams, *supra* note 131, at 309.

157. In addition, state equalization assistance looked to local expenditures per capita, not per pupil, as the measure of local fiscal capacity. In cities the school-age population is generally a smaller proportion of the total population than in suburbs. Thus, city education spending may appear higher than suburban spending if both are measured per capita but lower if both are measured per pupil. State aid that focuses on equalizing spending per capita will help suburbs and rural areas; only if the aid program focuses on spending per pupil will cities benefit more than suburbs. See, e.g., Bossert, *Education in Urban Society*, in *Handbook of Contemporary Urban Life* 299 (D. Street & Associates, eds. 1978).

158. See S. Sacks, *supra* note 155, at 92.

suburb has contributed to the ideological commitment to local autonomy that is a hallmark of our localism.

C. Changing Paradigms: The Suburb and the Legal Concept of the City

Much as local government law has contributed to suburban independence, the localist structure of state-local relations may be seen as reflecting the emergence of the suburb as a distinct, if not dominant, form of contemporary urban community. Contemporary courts and legislators frequently appear to model their notions of local governments on the small size, homogeneous populations and residential nature of suburbs. Questions of local power are often resolved by an implicit reliance on the idealized residential suburb as the paradigm locality. In a sense, "the city as a legal concept," has become a suburb, and this has contributed to the broad judicial deference to local autonomy elaborated in Part I.¹⁵⁹

The essence of the suburban model is the association of local government with the values of home and family. The suburb, the most common form of local government today, is conceived of as a small, primarily middle-class residential community, a place for domestic consumption rather than industrial production and a haven from the heartless political and economic world beyond local borders. The central function of local government is to protect the home and family—enabling residents to raise their children in "decent" surroundings, servicing home and family needs and insulating home and family from undesirable changes in the surrounding area.

This association of the municipal corporation with home and family provides a stronger foundation for legal localism than did the older notion of the locality as a complex urban ministate. At the same time, it obscures the perception of local government as a state institution and thus erodes the longstanding legal rule that local government actions are attributable to the state. In cases of head-to-head conflict with the state or of clear local violations of constitutional norms, the legal status of localities as state subdivisions will operate to limit local power. But when local governments conflict with individuals, particularly outsiders, or even when local governments prove fiscally unable to fulfill their responsibilities, then, so long as constitutional norms limiting government power are not clearly at issue, the locality may be seen as an agent not of the state but of local families, acting to defend the private sphere surrounding home and family.

The frequent linkage of local government to home and family leads to a deferential or protective attitude toward local power and a reluctance to mandate state intervention in local arrangements. As extensions of home and family, local governments appear to be less of a threat to personal liberty and less subject to central state control.

159. See Briffault, *supra* note 1, at 24–58, 85–111.

Rather, local governments merit legal protection because of their close association with the home and family interests of their residents.¹⁶⁰

This is clear from the United States Supreme Court's opinion in *Village of Belle Terre v. Boraas*,¹⁶¹ not simply in the holding sustaining local zoning authority to exclude nontraditional households,¹⁶² but in the Court's broader evocation of local government as a kind of moat protecting home and family from the crime, congestion and alien influences of the outside world.¹⁶³ The local government in *Belle Terre* was an extension of the home, not an arm of the state, a defender of the family rather than an oppressor of individual liberty.¹⁶⁴ The locality's exclusion of people who practiced an alternative lifestyle was unobjectionable because it was seen as an action similar to that of a family choosing not to welcome an unwanted guest into its home. Nor was Belle Terre's authority undermined by its position as a component of an economically and socially heterogeneous and interdependent metropolitan region. Rather, the village was, in Justice Douglas's words, "a sanctuary for people,"¹⁶⁵ a sort of national park for homes and families threatened by state power and urban ills.

The idea of local government as a "sanctuary for people" helps explain judicial and legislative support for local autonomy in zoning and school finance. Of all government activities, land use regulation and education have perhaps the greatest implications for home and family; these are the areas in which the local government as suburb may be presumed to be most effective in vindicating home and family values.¹⁶⁶

In the exclusionary zoning setting, as noted in the previous section, the new suburban paradigm was critical in redefining the concept of a residential area and of the role of local government in protecting "the well-being of our most important institution, the home."¹⁶⁷

160. Elazar points out, "Suburbia has become the equal of small-town America as the symbol of the country's grassroots." D. Elazar, *supra* note 20, at 12.

161. 416 U.S. 1 (1974).

162. See *id.* at 7-10.

163. See *id.* at 9.

164. In her discussion of *Belle Terre*, Professor Radin links the defense of the home to the concept of "personhood." She writes that "[o]ur reverence for the sanctity of the home is rooted in the understanding that the home is inextricably part of the individual, the family, and the fabric of society." Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957, 1013 (1982).

165. *Belle Terre*, 416 U.S. at 9.

166. Suburban development has been closely associated with protection of homes and families. "The appeal of the suburbs had a great deal to do with anxiety about child-rearing, about giving one's children the space they needed yet controlling the people they met and what they did outside the home." G. Wright, *Building the Dream: A Social History of Housing in America* 210 (1981). Buder refers to this as "family territoriality." See Buder, *The Future of the American Suburbs*, in *Suburbia: The American Dream and Dilemma*, *supra* note 130, at 193, 200.

167. *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 173, 89 A.2d 693, 697 (1952); see *supra* text accompanying notes 89-120.

Courts justified local laws restricting land use to large, private, owner-occupied, single-family houses situated on large lots as home-protection policies, with the courts implicitly accepting the suburban definition of "home." Even courts troubled by exclusionary zoning did not doubt the legitimacy of local efforts to support the socioeconomic interests of suburban homeowners.¹⁶⁸

The courts' underlying assumption that protecting the home requires policies that mandate an affluent homogeneity in the surrounding community drew on the suburban model of local government, which differs profoundly from the traditional concept of a city as a place of diverse incomes, lifestyles and land uses. American cities are not exclusive communities but rather heterogeneous microcosms of the larger society that surrounds them. Judicial legitimation of local zoning that seeks residential homogeneity as a home-protection policy suggests the influence of suburban settlement patterns.¹⁶⁹ Even today, *Mount Laurel*¹⁷⁰ and a handful of cases like it notwithstanding, the association of home protection with local control and homogeneous residential communities remains powerful.

Similarly, the school finance cases¹⁷¹ reflect the influence of the suburban model and the transformation of local government from subordinate arm of the state to protector of family interests. For many courts the central issue in these cases was not interlocal inequality but local control. The courts that defended local control, accepted wealth-based spending differences and rejected demands that the states assume a greater fiscal responsibility did so not because of any assumption that local governments possessed technical superiority in funding or operating schools but because they equated local control with parental involvement in the education of children. Not only would local control permit a larger parental role than under a system providing for greater state responsibility, but local control was also treated, at least metaphorically, as identical to parental control.¹⁷²

168. See *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 608–09, 557 P.2d 473, 488–89, 135 Cal. Rptr. 41, 56–57 (1976); see also *Robert E. Kurzius, Inc. v. Village of Upper Brookville*, 51 N.Y.2d 338, 344, 414 N.E.2d 680, 683, 434 N.Y.S.2d 180, 183 (1980) (large lot zoning is an appropriate means to assure open space and protect locality "from the ill-effects of urbanization"), cert. denied, 450 U.S. 1042 (1981).

169. See Briffault, *supra* note 1, at 39–41; *supra* text accompanying notes 160–168.

170. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975); see Briffault, *supra* note 1, at 48–55.

171. See Briffault, *supra* note 1, at 24–39 (discussing cases).

172. See *Lujan v. State Bd. of Educ.*, 649 P.2d 1005, 1023 (Colo. 1982); *Thompson v. Engelking*, 96 Idaho 793, 803, 537 P.2d 635, 645 (1975); *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 46, 439 N.E.2d 359, 367, 453 N.Y.S.2d 643, 652 (1982), appeal dismissed, 459 U.S. 1139 (1983); *Board of Educ. v. Walter*, 58 Ohio St. 2d 368, 377–78, 390 N.E.2d 813, 820 (1979), cert. denied, 444 U.S. 1015 (1980). Treating local school districts as surrogates for local parents, some courts were quick to reject arguments for equalizing school spending and imposing limits on spending by more affluent districts based on

The association of local control over school financing with family or parental control of education may be more likely to occur when suburbs, not cities, are the focus of attention. The association may, in fact, be more accurate when applied to the suburbs. Residents of suburban communities focus on family and school issues; schools and taxes, along with land use, are the chief subjects of suburban political discourse.¹⁷³ Suburban school districts tend to be smaller and have smaller bureaucracies than urban ones, so the structure of suburban school governance makes it easier for suburban parents and families to get involved in educational decision-making than it is for their counterparts in the cities.¹⁷⁴ Suburban districts also commonly have more money to spend on local needs. Local tax revenues are devoted primarily to schools, and the smaller percentage of suburban children who are poor, who do not speak English, come from broken homes or need special educational assistance in the suburbs minimizes the local need for outside financial support. For cities, local fiscal autonomy—in education as in other areas—is often an illusion, and parents' interests would be better served by greater state fiscal responsibility for local schools.

Local control of education is more likely to be seen as a means of protecting the family interest in public schools if suburbs, rather than cities, are the norm in thinking about local governments. The tendency to conceptualize local government after the model of suburbs as centers of families and homes facilitates the equation of local control with family control, encourages deference to state decisions devolving educational, administrative and financial responsibilities to the local level and makes it more difficult for concerns about interlocal inequality and the external effects of local actions to overcome the decentralization endemic to the system.

This "suburbanization" of local government law suggests that exclusionary zoning and school finance, rather than being weak links in the localist system of state-local relations,¹⁷⁵ may have been the most problematic subjects for seeking to challenge the dominant pattern of state decentralization of regulatory authority and financial responsibil-

federal or state equal protection grounds. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973) ("In part, local control means . . . the freedom to devote more money to the education of one's children"); see also Briffault, *supra* note 1, at 29–30.

173. See R. Wood, *supra* note 24, at 186–94. A higher percentage of suburban than city residents are families with school age children and a greater percentage of tax dollars is devoted to local schools in the suburbs than in big cities. See W. Colman, *supra* note 37, at 51–53. "In the suburbs, schools comprise a central institution around which community ties form, often because the school is the first and most important institution in the new community." Bossert, *supra* note 157, at 302.

174. See, e.g., R. Bish, *supra* note 142, at 104–18. But see Bossert, *supra* note 157, at 302 (despite centrality of schools to suburban community life and structures facilitating parental participation in school governance, rates of participation are low).

175. See Briffault, *supra* note 1, at 18–19.

ity for basic public services. By focusing on the largest and most expensive public service and the most important local regulatory authority, law reformers may have thought they were spotlighting the inequalities and inefficiencies built into the localist system of state-local relations. Yet schools are the public service most bound up with the idea of family, and zoning is the regulatory function most likely to signal "home" to courts attentive to suburban values. As the subjects most likely to trigger localist concerns in courts and legislators, schools and homes may be questionable candidates for attempts to reduce local autonomy or increase the state role in decisions affecting the metropolitan area.¹⁷⁶

Beyond the issue of local powers and responsibilities, the identification of local government with the small, homogeneous residential community and the values of home and family may have contributed to the courts' tendency to downplay the "createdness" of local governments. Although traditional doctrine provides that local governments exist only because of an act of creation by the state—with the implication that they hold their powers on behalf of the state—many of the cases reviewed in Part I¹⁷⁷ take local governments and their powers as givens rather than as products of conscious choices by states to structure governmental power in a particular way.

Thus, several state courts, in resisting the claim that the education articles of their state constitutions imposed a fiscal or administrative obligation, looked to state history and found that local school districts and local fiscal responsibility predated the constitutional obligation to provide public schools and may even have predated statehood itself.¹⁷⁸ The rejection of the redrawing of school district boundary lines or the restructuring of districts to promote greater interdistrict wealth equality or racial integration suggests a view of local school districts as somehow organically connected to local parents and not as state-created boundaries dividing the larger metropolitan community.¹⁷⁹

176. See, e.g., *Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 *Calif. L. Rev.* 837, 911 (1983).

177. See Briffault, *supra* note 1, at 24–58 (reviewing cases).

178. See *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1021 (Colo. 1982); *Thompson v. Engelking*, 96 Idaho 793, 803, 537 P.2d 635, 645 (1975); *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 654, 458 A.2d 758, 788 (1983); *Board of Educ. v. Walter*, 58 Ohio St. 2d 368, 377, 390 N.E.2d 813, 820 (1979); *Olsen v. State*, 276 Or. 9, 24–25, 554 P.2d 139, 147 (1976); *Danson v. Casey*, 484 Pa. 415, 427, 399 A.2d 360, 367 (1979); *Buse v. Smith*, 74 Wis. 2d 550, 570–72, 247 N.W.2d 141, 150–52 (1976).

179. The question of the nature of suburban school districts—whether they are local or arms of the state—was at the center of the division of the United States Court of Appeals for the Eighth Circuit sitting en banc in the Kansas City school desegregation case, *Jenkins ex rel. Agyei v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (plurality opinion), cert. denied, 484 U.S. 816 (1987). The dissenters would have approved a metropolitan area-wide interdistrict remedy because (1) the state of Missouri had been found liable for having previously required and supported segregated schools in Kansas City and (2)

Local school autonomy, in a sense, became pregovernmental. The New York Court of Appeals, in denying that the state had any responsibility to remedy interlocal taxing and public service inequalities, explained: "[T]he cited inequalities existing in cities are the product of demographic, economic, and political factors intrinsic to the cities themselves, and cannot be attributed to legislative action or inaction"¹⁸⁰—as if the state were not responsible for the rules limiting city expansion and facilitating the formation of independent, exclusionary suburbs. Similarly, in New Jersey, the *Robinson v. Cahill*¹⁸¹ Court excused the state from having to equalize spending across district lines so long as interdistrict spending disparities were not mandated by the state but rather resulted from seemingly natural interdistrict variations in wealth.¹⁸² The United States Supreme Court's hostility to interdistrict remedies for educational and housing disparities, as illustrated by *Milliken v. Bradley*¹⁸³ and *Hills v. Gautreaux*,¹⁸⁴ suggests the Court's acceptance of suburban governments as independent entities, defenders of local families and homes, rather than as creatures of the state, acting on behalf of the state in their local territories.¹⁸⁵

the suburban school districts were arms of the state, and therefore could be included in the Kansas City remedy. As Chief Judge Lay wrote in dissent,

While it is true that the [suburban school districts ("SSDs")] may have some authority to act independently, that authority is delegated to them by the state and the state retains ultimate authority over the SSDs' actions. The SSDs exist pursuant to provisions of the Missouri constitution, are maintained at the pleasure of the Missouri legislature, and are subject to the authority of state statutes and the rules and regulations of the Missouri State Board of Education.

Id. at 699 n.6 (Lay, C.J., dissenting).

The plurality, however, relied on the finding of the district court that "the SSDs were autonomous and independent" and that "the establishment and maintenance of school district boundaries was a local matter in Missouri, determined through local initiative," id. at 668, 678, to reject the argument that the state's liability could provide a basis for forcing the suburban districts to participate in a metropolitan area plan to desegregate the schools in Kansas City.

180. Board of Educ. v. Nyquist, 57 N.Y.2d 27, 41, 439 N.E.2d 359, 365, 453 N.Y.S.2d 643, 649 (1982); see Briffault, supra note 1, at 28.

181. 62 N.J. 473, 303 A.2d 273 (1973); see Briffault, supra note 1, at 31–35.

182. See *Robinson*, 62 N.J. at 499–500, 303 A.2d at 286.

183. 418 U.S. 717 (1974), discussed in Briffault, supra note 1, at 94–96.

184. 425 U.S. 284, 303–06 (1976) (upholding lower court remedial order requiring U.S. Department of Housing and Urban Development ("HUD") to site public housing projects in Chicago suburbs in part because HUD could not build housing without approval by locality where proposed site was located); see Briffault, supra note 1, at 106–07.

185. The move from local school districts as creatures of the state to local districts as possessors of a kind of organic independence was made with little discussion in *Milliken*. Early in the opinion, the Court, in summarizing the district court's findings concerning the state of Michigan's liability for segregation in the Detroit school system, noted: "School districts in the State of Michigan are instrumentalities of the State and subordinate to its State Board of Education and legislature." 418 U.S. at 726 n.5. The Court cites as authorities the provision of the state constitution directing the legislature to "maintain and support a system of free public elementary and secondary schools," "

Of course, not all courts have adopted the suburban model of local government. The state courts that invalidated local property-tax-based school finance systems did so, in part, by harkening back to the traditional notion of local governments as arms of the state. Treating education as the responsibility of the state and emphasizing that local school districts were created to carry out the state's educational duty, these courts held the state accountable for interlocal spending differences and mandated state action to improve the quality of education in the poorest districts.¹⁸⁶ Similarly, the handful of courts that challenged exclusionary zoning returned to the concept of local power as delegated state power, and held that exclusionary measures could be invalidated since there was no state interest in local exclusion.¹⁸⁷ The *Mount Laurel* doctrine, mandating that developing suburbs plan and provide for their "fair share" of regional low- and moderate-income housing needs,¹⁸⁸ invoked the older notion of the locality as a microcosm of the

id. (quoting Mich. Const. art. 8, § 2), and two Michigan Supreme Court decisions from the first decade of the twentieth century that took the black-letter law position that "[t]he school district is a State agency . . . of legislative creation" and "no part of the local self-government." Id. (quoting Attorney Gen. ex. rel. Kies v. Lowrey, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902); Attorney Gen. ex. rel. Zacharias v. Detroit Bd. of Educ., 154 Mich. 584, 590, 118 N.W. 606, 609 (1908)).

A few pages later, in finding that the separate existence of the suburban school districts immunized them from involvement in any remedial plan for the desegregation of the Detroit schools, the Court took a very different position on the autonomy of school districts. The Court stated that the district court's

analytical starting point was its conclusion that school district lines are no more than arbitrary lines on a map drawn "for political convenience." Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as mere administrative convenience is contrary to the history of public education in our country. . . . [L]ocal autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.

Id. at 741-42. At this point, the Court cited various Michigan statutes providing for the popular election of school boards, giving control of the "day-to-day affairs of the school district" to the local board and spelling out local school board authority. Id. at 742 n.20 (citing Michigan Schools Code of 1956 (current version at Mich. Comp. Laws Ann. §§ 380.1-380.1853 (1988 & Supp. 1989))). Local autonomy in practice proved to be more constitutionally significant than the formal status of school districts as state instrumentalities.

186. See, e.g., *Serrano v. Priest*, 5 Cal. 3d 584, 603, 487 P.2d 1241, 1254, 96 Cal. Rptr 601, 614 (1971), ("[g]overnmental action drew the school district boundary lines . . ."); *Robinson v. Cahill*, 62 N.J. 473, 501-521, 303 A.2d 273, 287-98 (1973).

187. See, e.g., *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 601, 607, 557 P.2d 473, 483, 487, 135 Cal. Rptr. 41, 51, 55 (1976); *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 209, 456 A.2d 390, 415 (1983); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 174-77, 336 A.2d 713, 725-26, appeal dismissed and cert. denied, 423 U.S. 808 (1975); cf. *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 189, 382 A.2d 105, 108 (1977) (state's interest in having each municipality bear its "fair share" of growth requires heightened scrutiny of antigrowth zoning ordinances).

188. *Mount Laurel*, 67 N.J. at 178-88, 336 A.2d at 727-34.

larger society. *Mount Laurel* sought to require suburbs—as political arms of the state—to wield their state-delegated zoning power to allow people of different backgrounds to live among them and become socially and economically integrated communities.

*Belle Terre*¹⁸⁹ and *Mount Laurel* exemplify the different approaches to local government and to the relationship between locality and state. Both have a place in thinking about local government law. Local governments are state-created and state-empowered, yet particularly responsive to local residents' social concerns. Local governments can be heterogeneous microcosms of the larger society or class-segregated residential enclaves. But as the review of the law in the areas of school finance, land use and local government formation indicates,¹⁹⁰ the approach taken in *Belle Terre* appears to be dominant.¹⁹¹ And the power of the *Belle Terre* approach is consonant with the role of the suburb as a paradigm for thinking about local governments.

The argument that the legal conceptualization of the city as a suburb may have contributed to the tendency of courts to affirm the localist structure of the law is an ironic counterpoint to Gerald Frug's contention that local governments lack power, and that local powerlessness is attributable to changes in "the legal concept" of the city—but to changes very different from the ones identified here.

The gist of Frug's argument is that in the eighteenth and early nineteenth centuries, cities enjoyed considerable legal power, in part because the word "corporation" in the term "municipal corporation" had legal significance. In that era, the city was akin to a closely held corporation, combining economic and political authority.¹⁹² The state was not hierarchically superior to the city, nor was the city merely a political subdivision of the state. Rather, the city was conceived of as an independent association of its constituents, more like a church, a uni-

189. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); see Briffault, *supra* note 1, at 101–04; *supra* notes 161–165 and accompanying text.

190. See Briffault, *supra* note 1, at 24–111.

191. Even in New Jersey, *Mount Laurel's* vision of the local government as a regional microcosm was expressly modified by the legislature, which authorized suburbs to contract out of their *Mount Laurel* obligation to absorb their fair share of regional housing needs by making payments to other, presumably less exclusive communities. See Briffault, *supra* note 1, at 54–55. A New Jersey deputy public advocate has been quoted as stating that the regional agreements do not permit a challenge to exclusionary local practices but instead "have the effect of reinforcing racial stratification." Hanley, *Open Housing is Mired in Lawsuits Again*, N.Y. Times, Jan. 2, 1990, at B1, B4, col. 3.

The state supreme court decisions invalidating school finance systems, see Briffault, *supra* note 1, at 36–38, indicate that the relationship between the two models continues to evolve, and that, with respect to education, the legal model requiring the states to take greater responsibility for the operation of the state-local system may come to play a larger role.

192. See Frug, *City as Legal Concept*, *supra* note 6, at 1095–99. Frug writes that colonial towns did not have charters and may not have been corporations in the technical sense, but that they were "conceived of as corporations." *Id.* at 1098.

versity or a guild—or a modern business corporation.¹⁹³

Frug argues that in the nineteenth century courts came to deny the autonomy of cities and to downgrade the significance of a municipality's corporate status.¹⁹⁴ The city ceased to be an association of its members and became instead a mere subdivision of the state, subject to extensive state regulation and control. City powers were limited to those expressly provided by state legislation, and were circumscribed by Dillon's Rule.¹⁹⁵ City autonomy fell victim to the view of municipalities as inferior creatures of the states, and states became free to intervene in municipal matters.

According to Frug, the change in the legal concept of the city can be attributed to the emergence of liberal ideas that sought to vest a unitary political sovereignty in the state legislature and strengthen the bonds directly linking the state and the individual. Once the state became the fundamental unit of political association, Frug contends, there was no room for political bodies that operated independently.¹⁹⁶ Thus, the municipality was transformed into a subordinate arm of the state, and its powers, political processes and regulatory goals limited to those the state chose to give it. Moreover, municipal action became subject to the constitutional rules that limited state regulatory and economic activity.¹⁹⁷ The demotion of the municipality from autonomous corporation to state subdivision curbed the scope of municipal action and restricted the ability of municipalities to engage in entrepreneurial activity.¹⁹⁸

193. The corporate city did not just regulate the private use of local land; it owned substantial local property and developed that property for overarching public purposes. The city did not just administer state laws locally, but legislated independently over a broad range of subjects for its own constituents, and its charter and corporate status insulated it from state interference with internal municipal affairs. See generally H. Hartog, *Public Property and Private Power* 1-60 (1983).

194. See Frug, *City as Legal Concept*, *supra* note 6, at 1099-1109.

195. See Briffault, *supra* note 1, at 8 (discussing Dillon's Rule).

196. Early American cities were not particularly democratic. Indeed, early nineteenth century state legislatures were hostile to the municipal corporation of the time, in part because of property or wealth requirements for the municipal franchise. These requirements inspired the view that municipal corporations were citadels of entrenched privilege to be stormed by state governments as the guardians of democratic control. State legislative intervention was not seen as outside intervention in the local polity but rather as democratization of municipal governance. See generally J. Teaford, *The Municipal Revolution in America* 79-90 (1975) (discussing increasing role of state legislatures in supervising municipal affairs).

197. See Frug, *City as Legal Concept*, *supra* note 6, at 1099-1120.

198. Going beyond Frug's argument, the changing legal image of the city in the nineteenth century was followed by political, economic and social changes that confirmed the judicial tendency to support strong state controls over local governments. See, e.g., Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. Rev. 429, 477-79 (1987). Immigration and industrial growth created sharp distinctions between the people, politics and ways of life of the big cities and the rest of the state. The city came to be perceived as a noisy, dirty, crowded, foreign and politically corrupt place. Many city taxpayers and residents of older, Yankee

Frug fails to note that the nineteenth century view of the great cities was not consistently negative. The city's political, economic and social complexity, the density of its internal interactions, the distinctive cast of its problems and the enormous differences between urban and rural areas during this period of rapid economic and demographic change provided some justification for city autonomy. Underlying the contemporary home rule movement was the belief that the city needed a government responsive to its particular needs and that it could sustain a diverse local public life.¹⁹⁹

The coexistence of home rule and Dillon's Rule reflected, and continues to reflect, this tension between two views of the city: a complex local polity, entitled to self-governance and capable of supporting a local political system; and an administrative arm of the state, and as such both a potential threat to individual liberty and a hierarchically subordinate institution subject to state control. These developments concurrently justified and constrained local autonomy. But neither urban development nor legal modelling ended with World War I. The municipal corporation has been transformed again, this time from city to suburb—from local government as political, social and economic microcosm to local government as middle-class residential refuge.²⁰⁰

stock became political minorities in the cities they once controlled and may have felt greater kinship with the interests and values of the nonurban parts of the state than with the immigrant-dominated machines. These traditional urban elites opposed municipal spending and revenue-raising programs, so that for them state limitations on municipal taxing, borrowing and spending were no interference with their political freedom but rather a defense against the encroachments of corrupt local governments. See generally M. Schiesl, *The Politics of Efficiency: Municipal Administration and Reform in America, 1860–1920*, at 88–132 (1977). At the same time, the emigration of these groups from the city to the outlying suburbs provided the political basis for the legal changes facilitating suburban incorporation and permitting suburbanites to resist annexation. See, e.g., J. Teaford, *supra* note 53, at 82–84; *supra* notes 78–82 and accompanying text.

The legal concept of the city as a junior political institution, then, was reinforced by a negative perception of the city as a social entity.

199. See M. Schiesl, *supra* note 198, at 6–24; J. Teaford, *supra* note 87, at 103–22.

200. As political scientists and sociologists have noted, contemporary suburbia, considered as a whole, is no longer exclusively residential or middle class, but it is instead marked by considerable functional and demographic diversity. See, e.g., M. Baldassare, *supra* note 22, at 30–31, 49–50; R. Fishman, *supra* note 51, at 182–207; J. Harrigan, *supra* note 18, at 249–52; J. Logan & H. Molotch, *supra* note 17, at 187–92. Yet, as these scholars also point out, “the suburban image” of a “white middle class settlement” “is so strong as to be engraved in America’s collective memory.” M. Baldassare, *supra* note 22, at 30; accord J. Harrigan, *supra* note 18, at 249 (“our thinking about suburbs is in many ways still dominated by several myths that . . . portrayed suburbia as a large dormitory . . .”). It is this image, not current practice, that affected the conceptualization of suburbs which appears in local government law. Moreover, the suburban myth may have more closely approximated suburban reality in the early and middle decades of the century when the suburbs, and legal status of the suburbs, were first being formed. M. Baldassare, *supra* note 22, at 6. Perhaps once the changes affecting suburbia are more widely understood, the hold of the traditional suburban model will weaken and a new approach to local governments—one that recognizes the frag-

Adding the two earlier views of the city to the current concept of local government as suburb suggests that there are three concepts of local government at work in the law today: the traditional standard of local government as arm of the state; the "city" idea of local government as a diverse, urban polity—a state in microcosm; and the suburban notion of local government as the site, and virtual extension, of home and family. Exclusive focus on local government as state subdivision leads to the assumption that the legal system provides no place for local control. When combined with the further assumption that most local governments are cities, it is easy to indict local government law for failing to provide political autonomy to those urban polities clearly capable of local self-government. But when attention is given to the third model, a different picture emerges. Within the constraints of the formal, underlying authority of the state, suburbs enjoy substantial legal autonomy.

As was suggested at the beginning of this Part, legal theory must attend to the wide variety of places captured within the broad category of local government, especially the economic and social differences that distinguish cities from suburbs. As cities have been the focus of traditional writing about local governments, this section and the two which preceded it have sought to underscore the importance of suburbs, the fit between local powers and suburban interests, the role of the law in promoting and protecting suburban autonomy and the role of the suburbs in the shaping of local government law. An understanding of the place of the suburbs in the legal landscape is crucial to the critical description of the scope of local legal authority and to an analytical account of how a body of law ostensibly built around a state-centered theory evolved into a strongly local-oriented set of powers, practices and institutions.

The salience of the suburbs, in fact and in law, must also be taken into account in addressing the question of how broad local powers ought to be. Much of the contemporary case for expanding local power relies on the traditional association of local government with city, and on the presumed difference between the city and the state. Once greater attention is paid to the significance of the suburbs and to interlocal differences, the argument for greater localism becomes considerably more problematic.

D. *The "Polis" and the "Firm," or Two Tales of the City*

Contemporary normative discourse about the proper scope of local autonomy is dominated by two theories which—although they proceed from distinctive premises, are phrased in different rhetoric and represent separate scholarly traditions—converge on the general prop-

mentation of metropolitan areas and the significance of interlocal wealth differences, see *infra* text accompanying notes 369–380—will emerge.

osition that local autonomy should be protected and enhanced. The two arguments emphasize different fundamental values: participation in public life in the one and efficiency in the provision of public sector goods and services in the other. Similarly, the theories rely on contrasting metaphors for the central mechanism of local public life: "voice" in the one case and "exit" in the other.²⁰¹ Yet the two tales told by political and economic theorists share a common commitment to localism.

This Section sketches out these arguments, political and economic, for local autonomy, and then examines their relative strengths and weaknesses, their points of agreement and their common failings. It attempts to show that the two localist theories, whether considered separately or taken together, fail to provide a compelling normative basis for an ideological commitment to localism.

1. *Localism and Participation: Local Government as "Polis."* — As Clayton Gillette has written, "[p]articipation is again in the air. Apparently fueled by current debates concerning decentralized power and republican versus pluralist traditions in our political and legal theory, those concerned with political decisionmaking have turned their attention to calls for increased public involvement in the process."²⁰² The argument for enhancing opportunities for individuals to participate in politics has been strongly tied to local autonomy.

The centerpiece of legal scholarship advancing the link between political participation and local government is Gerald Frug's *The City as a Legal Concept*.²⁰³ Frug's thesis has three parts: (i) individual participa-

201. The source of this typology of mechanisms for collective decisionmaking is A. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (1970).

202. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 Mich. L. Rev. 930, 930 (1988).

203. Frug, *City as Legal Concept*, supra note 6; see Frug, *Empowering Cities*, supra note 6, at 563–66; Frug, *Property and Power: Hartog on the Legal History of New York City*, 1984 Am. B. Found. Res. J. 673, 687–90 [hereinafter "Property and Power"].

Frug's work, particularly its commitment to decentralized decision making as a basis for "devising viable alternative visions of society," Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 Stan. L. Rev. 199, 230 (1984), has become an integral part of the Critical Legal Studies canon, although the endorsement of participation and the connection to local power has not been limited to proponents of Critical Legal Studies.

On the place of Frug's work on local government in the body of Critical Legal Studies scholarship, see M. Kelman, *A Guide to Critical Legal Studies* 206–12 (1987) (Frug situated in the Critical Legal Studies movement's consideration of legal process and institutional issues); Kelman, *Trashing*, 36 Stan. L. Rev. 293, 302 & n.28 (1984) (Frug an example of a Critical Legal Studies thinker who proposes "concrete" reforms); Presser, *Some Realism About Orphism or the Critical Legal Studies Movement and the New Great Chain of Being: An English Legal Academic's Guide to the Current State of American Law*, 79 Nw. U.L. Rev. 869, 892 & n.86 (1985) (calling Frug's examination of local government as a form of "intermediate association" one of the "most prominent example[s]" of "the noblest . . . work" in Critical Legal Studies scholarship); Sparer,

tion in public decision making is an important political value, yet opportunities for participation are inadequate and declining; (ii) individual involvement can occur only in small political units, primarily local governments; and (iii) individuals will participate in local politics only if there is "a genuine transfer of power" to local government. Frug thus moves from asserting the value of popular participation in politics to making a normative claim for greater local legal power.²⁰⁴

Frug's argument for political participation is couched in terms of benefits to the individual and the society. Indeed, individual and social welfare are intertwined, with political participation seen as enhancing both the lives of the participants and the welfare of the polity that promotes it. Following Hannah Arendt,²⁰⁵ Frug and other participation theorists return to the concept of "public freedom"—the ability to participate actively in the basic societal decisions that affect one's life."²⁰⁶ Frug claims that modern society allows "little opportunity . . . for the individual to create his own material life, determine his own political future, or form his own ideas from personal experience."²⁰⁷ Political participation can thus serve as a remedy for this condition, a form of personal empowerment and an antidote to the anomie and alienation of modern mass society. Moreover, since political issues are collective issues, individuals involved in politics will be compelled to discuss, deliberate and debate with each other. They will have to listen to each other's positions, learn the arts of persuasion and compromise and engage in what Frug refers to as "a conversation designed to find a satis-

Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement, 36 *Stan. L. Rev.* 509, 510 & n.4 (1984) (Frug "is *the* leading work in American legal literature on decentralized government authority."); Williams, *supra* note 198, at 477–79 (criticizing Frug's local government work but calling it "extremely influential in CLS circles").

Other legal scholars who justify local power at least partially in terms of participation include Gillette, *supra* note 202, at 952 ("[O]nly at the local level [can] the mass of individuals . . . fully participate and realize their potential."); Gillette, *Fiscal Federalism and the Use of Municipal Bond Proceeds*, 58 *N.Y.U. L. Rev.* 1030, 1076–78 (1983) ("Given the distance between electors and elected at the state and national levels, local politics remains the last bastion of political participation."); Libonati, *Reconstructing Local Government*, 19 *Urb. Law.* 645, 651–52 (1987) (discussing impact of "communalist thinking" on local autonomy); Rose, *supra* note 176, at 883–84 ("Participation or voice is a particularly venerable legitimator of local government.").

Contemporary "civic republican" political theory also justifies expanded local power in terms of political participation. See, e.g., S. Elkin, *supra* note 32, at 10, 105–07, 146–83 (treating cities as "formative institutions" that provide citizens with opportunities for participating in self-government).

204. See Frug, *City as Legal Concept*, *supra* note 6, at 1068–70.

205. H. Arendt, *On Revolution* (1963).

206. Frug, *City as Legal Concept*, *supra* note 6, at 1068 (quoting H. Arendt, *supra* note 205, at 114–15, 119–20).

207. Frug, *City as Legal Concept*, *supra* note 6, at 1069. According to Jane Mansbridge, participatory democracy fills "human needs." J. Mansbridge, *Beyond Adversary Democracy* 4 (1980).

factory resolution of differences”²⁰⁸ Participation, it is asserted, will improve the relationship between the self and others and so strengthen the fellow feeling within a community.

In addition, through political participation it is hoped that people will learn about the issues, processes and institutions of government. They will come to know their government better—how to use it and how to control it. Participation is an education for self-government in a double sense: it equips people with the “individual attitudes and psychological qualities” that make self-government possible while providing an opportunity for what Carole Pateman calls “practice in democratic skills and procedures.”²⁰⁹ The expansion of opportunities for participation in public life becomes a way of saving the civic republican tradition from an elite-dominated, special-interest pluralism. Participation, it is suggested, will enable the people to reclaim their political birthright from professional politicians and will infuse public decision making with public-regarding values.

Running through the work of Frug and the other writers who link participation and its attendant political, social and psychological benefits to local autonomy is what Robert Dahl called the “millennial appeal” of the Greek city-state.²¹⁰ The “polis” metaphor is important, both as an invocation of a mythic, golden era in the history of democracy when political communities were small enough to give each citizen an effective voice and the citizenry exercised a collective role in politics and as a contemporary exhortation to vest power in today’s cities.²¹¹ The “tradition from Aristotle to Rousseau”²¹² associated democratic self-governance with urban states. Although the size and scale of a continental polity like the United States limits the relevance of Periclean Athens, Rousseau’s Geneva or the colonial New England town as a model for national governance,²¹³ the longing for a greater degree of citizen involvement in public life has led many participation theorists to make the contemporary vestige of the polis—local government—a focal

208. Frug, *Empowering Cities*, supra note 6, at 559.

209. C. Pateman, *Participation and Democratic Theory* 42 (1970).

210. Dahl, *The City in the Future of Democracy*, 61 *Am. Pol. Sci. Rev.* 953, 954 (1967). In the American setting, the longing for the polis is often transmuted into nostalgia for the New England town meeting. See, e.g., *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 672–73 (1976).

211. Referring to another historical place that has become a metaphor for the shared values of participation and local empowerment, Ira Katznelson writes, “[v]isions of the high-medieval town perform an important ideological function for those who wish to distinguish a more satisfactory past from the present. Distinctions such as those between *Gemeinschaft* and *Gesellschaft*, folk and urban, and tradition and modernity are used to distinguish a lost (but retrievable?) past from contemporary society.” I. Katznelson, *City Trenches: Urban Politics and the Patterning of Class in the United States* 25–26 (1981). Frug devotes considerable attention to the high-medieval town. See Frug, *City as Legal Concept*, supra note 6, at 1083–90.

212. Frug, *City as Legal Concept*, supra note 6, at 1069.

213. See Dahl, supra note 210, at 956–57.

point for efforts to advance participatory democracy.²¹⁴

Local governments are crucial arenas for participation because they are small in area and population—at least when compared to the state or nation. Frug asserts that “individual involvement in decision-making is impossible except on a small scale”²¹⁵—and that means local governments. Small size facilitates the deliberative process, the exchange of information and ideas that is at the heart of participation. Face-to-face interaction is possible only in small units.²¹⁶ Furthermore, people in small units are believed to understand more about the issues at stake and know more about each other, both of which may facilitate public-spirited decision making.²¹⁷ It is often assumed that people in smaller units are likely to have common interests and to share values and norms,²¹⁸ and that, as a result, they may be willing to put aside individual self-interest for the local city’s common good.²¹⁹ In other words, localities may have a greater sense of community, which, it is assumed, will facilitate participatory decision making. Participation, in turn, is said to reinforce the sense of community that promotes greater local participation.²²⁰

214. See, e.g., R. Dahl & E. Tufte, *Size and Democracy* 53–62 (1973); Dahl, *supra* note 210, at 963–64 (“[In pursuing the quest for] a unit that seems optimal for rational self government . . . I think that we shall finally end up about at the place where the Greeks left off: somewhere within view of the democratic city.”). Noting developments in communications technology, Benjamin Barber presents the relatively rare argument that participatory democracy is possible in large-scale institutions. B. Barber, *Strong Democracy* 260–98 (1984).

215. Frug, *City as Legal Concept*, *supra* note 6, at 1069. Frug actually provides very little discussion of the link between small size and participation. He states simply, without citation, that “[o]ne step towards meeting th[e] objective” of increasing the degree of individual involvement in societal decision “is the reduction of the scale of decisionmaking, since limited size appears to be a prerequisite to individual participation in political life or at the workplace.” *Id.*

216. See J. Mansbridge, *supra* note 207, at 281–85.

217. Clayton Gillette puts it in economic terms: small size permits repeated interactions among identifiable members of the community. See Gillette, *supra* note 202, at 984–85. Once people see that fellow community members are willing to look to the common good, they will also put community interest over self-interest. See *id.* at 965.

Jane Mansbridge and Robert Wood make the same point but in different language. For Mansbridge, small size permits “face-to-face assembly” and the attendant benefits of “empathy and commitment to the common good.” J. Mansbridge, *supra* note 207, at 270, 275. Wood links the value of the small community to propinquity, interdependence and common beliefs and background. From living close to each other people become familiar with each other’s needs and characteristics; interdependence leads to good will and cooperation; shared goods and values are conducive to collective decision making. All three of these aspects facilitate participation, and all three are present in a small community. See R. Wood, *supra* note 24, at 266–67.

218. See R. Dahl & E. Tufte, *supra* note 214, at 13–14; J. Mansbridge, *supra* note 207, at 270–73, 281; R. Wood, *supra* note 24, at 267–68.

219. See, e.g., Gillette, *supra* note 202, at 964–68.

220. See P. Steinberger, *Ideology and the Urban Crisis* 67 (1985).

Furthermore, small size is important, it has been argued, because only in smaller units will people feel that their participation counts, that they can make a difference. At the national or state level, the individual may well conclude that his voice will be drowned out by millions of others, that her views will have only an infinitesimal effect on the outcome, and therefore that participation is futile. But where the unit is small, each individual can be heard by and can influence a significant portion of the community. In small units, each citizen has a greater share of power. The resulting enhanced sense of "citizen effectiveness"²²¹ presumably will lead to more participation, which, by reinforcing the sense of effectiveness, will maintain and increase participation.²²²

Although the link between local government and greater participation is strong in theory, it is uncertain in fact. In a leading empirical study of the connection between unit size and political participation, Dahl and Tufte compared large and small democratic nations and found no general correlation between size and participation. They also looked within countries at units of the same legal type but different size and again found no general relationship between size and participation.²²³ In the United States, it is common knowledge that voter turn-

221. The term is from R. Dahl & E. Tufte, *supra* note 214, at 41.

222. Local governments are not the only small units. Many writers assert that the work place, rather than the local government, is the more likely place for the development of participation. See C. Pateman, *supra* note 209, at 45-102; see also J. Mansbridge, *supra* note 207, at 47-58, 139-48 (examining participation in both a New England town and a work place). Frug notes that work places as well as local governments are of sufficiently small scale to provide opportunities for participation but believes that decentralization of power is far more likely to occur in public institutions like governments than in private work places. See Frug, *City as Legal Concept*, *supra* note 6, at 1148-49.

Stephen Elkin makes a different argument for the empowerment of local governments as opposed to other small institutions. He asserts that local governments are particularly well-suited for educating people in self-government because of the nature of the issues that come before local governments. Elkin writes:

[S]truggle and debate over the public interest must be connected to the day-to-day vital interests of citizens. . . . Political argument about the public interest must be tied, then, to specific policy choices, and those choices must be of such a kind that at least the major dimensions are comprehensible to those involved; in the case of ordinary citizens, this means choices that involve such things as neighborhood matters, schools, the land-use patterns of their localities

S. Elkin, *supra* note 32, at 153.

Thus, as John Stuart Mill put it, participation at the local level is the "practical part of the political education of a free people." J.S. Mill, *On Liberty* 181 (Penguin ed. 1974).

223. R. Dahl & E. Tufte, *supra* note 214, at 41-66. A study of political behavior in the suburbs of metropolitan Philadelphia found that participation was more directly correlated with the income and education of residents than with the size of the jurisdiction. See C. Gilbert, *Governing the Suburbs* 275-77 (1967).

out is usually higher for presidential elections than for state-wide elections, and greater for state-wide contests than for local ones.²²⁴

Frug, however, suggests that the lack of empirical support for the claimed connection between unit size and participation is largely attributable to the lack of local autonomy, which, he argues, characterizes American local government law.²²⁵ People will not engage in local politics, Frug contends, because local governments have little power. Enhanced participation requires not simply the existence of small units but the devolution of power to them. He claims that “[p]ower and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so.”²²⁶

This insight is at the center of Frug’s argument and links his positive and normative critiques. Much of Frug’s article attempts to substantiate the assertion that local governments have little power, that the legal status of American cities has been in steady decline and that local government law has crippled the cities. “City powerlessness matters,”²²⁷ he argues: it excuses the current low levels of participation in local politics and it justifies the call for greater local autonomy and the protection of local governments from state interference. Empower localities, restrict the states from imposing their will on local units, and greater participation will result.²²⁸

Political participation, thus, drives Frug’s commitment to expanding local legal power. Greater local legal power and the decentralization of authority from the states to localities will give people a stronger voice in public decision making and a new ability to take charge of the decisions that affect their lives. In turn, greater local autonomy, by encouraging participation and giving people a sense of their capacity for governance, will affect the politics of the larger soci-

224. Mansbridge’s study of a Vermont town found that only about one-third of voters attended town meetings—this in a town with an adult population of approximately 350, where the town meeting had plenary authority over zoning and school budgets. J. Mansbridge, *supra* note 207, at 47–48. This is consistent with other findings about participation in local elections. By comparison, even the recent low levels of voter participation in presidential elections have consistently exceeded 50%. See, e.g., N. Polsby & A. Wildavsky, *Presidential Elections* 14 (7th ed. 1988) (table) (turnout in presidential elections as a percentage of eligible voters was 60.9% in 1968, 55.2% in 1972, 53.5% in 1976, 52.6% in 1980 and 53.3% in 1984); Berke, 50.16% Voter Turnout Was Lowest Since 1924, *N.Y. Times*, Dec. 18, 1988, at 36, col. 1 (reporting preliminary findings concerning turnout of age-eligible Americans in 1988 presidential elections).

225. See Frug, *City as Legal Concept*, *supra* note 6, at 1067–71. But see Briffault, *supra* note 1, at 6–12 (critically discussing Frug’s characterization of local government autonomy).

226. Frug, *City as Legal Concept*, *supra* note 6, at 1070.

227. *Id.* at 1067.

228. See *id.* at 1073; see also S. Elkin, *supra* note 32, at 176 (“[U]nless political institutions touch on the day-to-day concerns of citizens, they will not succeed in placing citizens in a deliberative relation.”).

ety. It will also, it is hoped, transform the people from apathetic on-lookers and occasional participants in the quadrennial choice among candidates representing a limited range of positions to active, public-spirited agents of change. The participationist case for local autonomy envisions local power as, ultimately, the key to the reformation of national politics and the creation of a new, more vibrant public life.²²⁹

2. *Localism and Efficiency: Local Government as "Firm."* — Like localist participation theory, the principal economic analysis of local government also proceeds from a concern that the centralization of public power at the national level impairs the vindication of a fundamental norm. The economists' focus is on the lack of a market mechanism by which the national government can register and respond to individual preferences with respect to the types and levels of public goods and services.²³⁰ As a result, both the aggregate level of public goods and services and their mix are unlikely to correspond to public desires.²³¹ Given the government's coercive power and its monopoly over the provision of public goods and services, taxpayers are likely to be compelled to pay for goods and services they do not want, and the overall operation of the public sector will be inefficient.

Like the participation theorists, the urban economists see the empowerment of local governments as a way to overcome the perils of centralization. In his seminal article, *A Pure Theory of Local Expenditures*,²³² Charles Tiebout hypothesizes that "'a market-type' solution"²³³ exists to determine the a level and mix of government expenditures that are responsive to citizens' demands—but only at the local level. Tiebout argues that the local public sector is more likely to be efficient than the national government because at the local level people have more freedom to choose the services they want and to pay for

229. See, e.g., Frug, *City as Legal Concept*, *supra* note 6, at 1067–73, 1149 (“[A] restructuring of city power to promote a greater degree of ‘public freedom’ is the rationale for an increase in city power.”).

230. See, e.g., Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 416–18 (1956) (discussing work of Richard Musgrave and Paul Samuelson in public finance theory).

231. “No ‘market type’ solution exists to determine the level of expenditures on public goods.” *Id.* at 416. Earlier writers suggested that because of the lack of an adequate mechanism to get citizens to reveal their preferences, and because of the free rider problem, public services would be underprovided or not “sold” at all. See *id.* at 417 (“As things now stand, there is no mechanism to force the consumer-voter to state his true preferences; in fact, the ‘rational’ consumer will understate his preferences and hope to enjoy the goods while avoiding the tax.”). Later public-choice writers emphasized the ability of relatively small special interests to manipulate the process to get the public as a whole to pay to implement their agenda because the public as a whole was immobilized by steep barriers to collective action. See, e.g., J. Buchanan & G. Tullock, *The Calculus of Consent* 283–95 (1962); M. Olsen, *The Logic of Collective Action* 144 (1971).

232. Tiebout, *supra* note 230.

233. *Id.* at 416.

just those services.²³⁴

Tiebout's model does not rely on the small size of localities or the greater opportunities for participation in the local political process. Indeed, he has nothing to say about the inner workings of local government at all. Instead, he proceeds from two other characteristics of local governments that sharply differentiate them from the national government: their numbers, and the relative ease of individual movement from one locality to another.²³⁵

The multiplicity of local governments in a metropolitan area means that, as long as each locality is free to adopt its own mix of services, regulations and charges, area residents will be offered a wide array of types and levels of public services and a wide variety of rates of taxation. By moving from one locality to another, an individual can select from among these diverse local tax, service and policy packages the one that best matches her interests. The multiplicity of local governments and the freedom of individuals to move among them together create a market in public services.

Tiebout assumes that local governments play a relatively passive part in this market-type mechanism, presenting a variety of revenue and expenditure patterns that are "more or less set."²³⁶ The dynamic element in the public sector marketplace is the individual, or, in Tiebout's terminology, "the consumer-voter."²³⁷ The central mechanism for revealing public service preferences is relocation: "The act of moving or failing to move . . . replaces the usual market test of willingness to buy a good and reveals the consumer-voter's demand for public goods."²³⁸ By settling in a particular locality, "[t]he consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods."²³⁹ People decide on the taxes they want to pay and the type and level of services they want to receive by "shopping around" among the various localities in a given metropolitan area before "purchasing" by moving to the one that best fits their needs. The multiplicity of localities assures a range of choices and increases the likelihood that one locality will approximate the mobile consumer-voter's preferences.

Since Tiebout first articulated his theory, the economic approach to local government has evolved from an assumption of purely passive localities to include an argument that consumer-voters influence local government policies, taxes and services. A consumer-voter is free to leave a locality that taxes her at a rate higher than she wants to pay, pursues policies she dislikes or funds services she does not want; she

234. *Id.* at 418.

235. *Id.* at 419.

236. *Id.* at 418.

237. *Id.* at 417.

238. *Id.* at 420.

239. *Id.* at 418.

can move to another locality that provides a more optimal mix of taxes and programs. A locality whose public policies are inconsistent with the preferences of too many of its residents or potential entrants will lose population and tax revenue. Such a locality will respond by cutting costs, reducing taxes and altering policies.²⁴⁰

The addition to the model of activist local governments that compete with each other like private firms heightens the market-like features of interlocal relations.²⁴¹ The freedom of taxpayers to exit and the availability in a metropolitan area of large numbers of local governments as possible destinations restrain the monopolistic tendencies of government.²⁴² Interlocal competition constrains taxing, spending and administrative inefficiency for all localities and thereby improves local government's general responsiveness to consumer-voter concerns while systematically holding down the aggregate cost of local government.²⁴³

The urban economists' commitment to the efficiency value of local autonomy and interlocal competition has significant programmatic consequences. A basic premise of the Tiebout hypothesis is that localities can and must have the power to set the types and levels of public services they offer and must rely on local resources to fund their expenditures. The multiplicity of local governments would not promote efficiency unless each could set its own fiscal policies. Thus, urban economists support local decision-making authority over taxing and spending.

Moreover, these economists strenuously oppose such traditional "good government" proposals as the consolidation of smaller localities into larger units,²⁴⁴ the creation of metropolitan-area-wide governments,²⁴⁵ restrictions on the incorporation of new municipalities²⁴⁶ and the transfer of responsibility for the provision of public services from localities to higher levels of government.²⁴⁷ Whereas traditional

240. See, e.g., R. Bish & V. Ostrom, *supra* note 147, at 53.

241. See, e.g., V. Ostrom, R. Bish & E. Ostrom, *supra* note 24, at 206 ("[R]ivalry among local governments is analogous to rivalry among firms . . .").

242. See R. Bish & V. Ostrom, *supra* note 147, at 30–31.

243. See, e.g., P. Peterson, *supra* note 31, at 46–47.

244. See, e.g., R. Bish, *supra* note 142, at 55; V. Ostrom, R. Bish & E. Ostrom, *supra* note 24, at 139–87.

245. See, e.g., R. Bish, *supra* note 142, at 79–103; Wagner & Weber, *Competition, Monopoly, and the Organization of Government in Metropolitan Areas*, 18 *J.L. & Econ.* 661, 672 (1975) (metropolitan-area-wide government can force taxpayer to pay for the "full line" of government services rather than allowing him to select among components of the government's "line"); Warren, *A Municipal Services Market Model of Metropolitan Organization*, 30 *J. Am. Inst. Planners* 193 (1964).

246. See, e.g., Martin & Wagner, *The Institutional Framework for Municipal Incorporation: An Economic Analysis of Local Agency Formation Commissions in California*, 21 *J.L. & Econ.* 409, 414–16 (1978).

247. See, e.g., Ostrom, Tiebout & Warren, *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 *Am. Pol. Sci. Rev.* 831, 841–42 (1961).

political scientists warned that the fragmentation and overlap of local governments that characterize most metropolitan areas posed a threat to political accountability, these urban economists praise fragmentation and overlap for enhancing the capacity of the "metropolitan municipal services marketplace" to accommodate differences in personal preferences for public goods and services and to generate the efficiencies that result from interlocal competition.²⁴⁸

This endorsement of fragmentation and overlap follows directly from the Tiebout model. The multiplicity of local governments is significant not simply because it provides consumer-voters with a variety of public service and tax packages, but also because it facilitates the operation of Tiebout's central decision-making mechanism—consumer-voter mobility. The more governments there are in close proximity to each other, the easier it is for any individual to gather information, to compare the tax and service packages offered by each locality and to move from one to another. The greater the number of local government "firms" in competition, the more responsive each will be to the preferences of consumer-voters, and the more efficient local government will be.²⁴⁹

Although Tiebout's localism is based primarily on the multiplicity of localities and the freedom of interlocal movement, other economists have also looked to the internal structure of localities to justify local autonomy. Like the political theorists, these economists emphasize the value of small size, contending that the costs of government correlate directly with the size of the governmental unit. Even without interlocal competition, they argue, government is likely to be more efficient at the local level because the costs of government will be lower.

The costs of government include the costs of political transactions—the time and effort involved in the bargaining, debate and interactions that are necessary for a collective body to reach a decision—and the costs to individuals of government decisions that go against them. Bish refers to the former as decision-making costs and the latter as "political externality costs."²⁵⁰ Decision-making costs relate directly to the size of the polity. The larger the group, and the more interactions within it, the more time and effort a collective decision will require. Political externality costs may also increase with the size of the polity since bigger units are typically more heterogeneous. In heterogeneous units more people are likely to have preferences that diverge from the median, while in smaller, more homogeneous units, there may be less

248. See, e.g., R. Bish & V. Ostrom, *supra* note 147, at 71–75; V. Ostrom, R. Bish & E. Ostrom, *supra* note 24, at 83–95; Wagner & Weber, *supra* note 245, at 661, 684.

249. See, e.g., Ostrom, Tiebout & Warren, *supra* note 247, at 838.

250. R. Bish, *supra* note 142, at 35–37; see also J. Buchanan & G. Tullock, *supra* note 231, at 63–84 (applying economic theory to structures for political decision making).

internal disagreement.²⁵¹

The economic argument for small size and the reduction of political externality costs is reinforced by the Tiebout model. The multiplicity of local governments and the mobility of consumer-voters, it is argued, mean that people will be drawn to localities providing the types and levels of services they prefer. The theory suggests that people will sort themselves out through free movement, settling in the localities that offer the taxes and services they want and leaving the localities whose taxation and service packages they dislike. As a result, localities will draw the people that most resemble existing local majorities, lose local dissenters and fail to attract people who do not agree with local public decisions. Localities will tend to become more homogeneous, thus reducing political externality costs within each jurisdiction.²⁵² By facilitating local homogeneity, small size²⁵³ joins Tiebout's multiplicity and mobility factors in justifying local autonomy and the proliferation of local governments as the best means of promoting efficient government.

3. *The Two Tales Taken Together: The Uncertain Case for Local Autonomy.* — Despite their divergent intellectual provenances and differing normative first principles, the political and economic arguments for localism have much in common. The two theories arrive at the same end point of advocating local autonomy and complement—and borrow from—each other along the way.

Thus, participation theorists have on occasion relied on Tiebout's assumptions about the importance of interlocal personal mobility as an important rejoinder to the Madisonian attack on local power.²⁵⁴ Madison's defense of the size of a continental republic based on the

251. See R. Bish, *supra* note 142, at 51–52.

252. See *id.* at 52.

253. History demonstrates that small size does not always mean internal harmony. As Dahl observed about the classical Greek and medieval Italian city-states, [t]heir history is a tale of bitter conflicts and an almost total failure to develop effective institutions for settling political disputes by peaceful and constitutional means. Not only did they lack institutions for settling disputes between one city-state and another; they were not much better at settling internal conflicts, which erupted with great frequency along all the lines of cleavage . . . family, kinship, neighborhood, occupation, class, religion. The outcome of political conflict was typically savage.

R. Dahl, *Dilemmas of Pluralist Democracy* 10 (1982).

Although the conflicts were less intense, Mansbridge also found politics in Vermont marked by sharp cleavages, primarily between newcomers and old-timers. See J. Mansbridge, *supra* note 207, at 89–96.

254. Cf. Rose, *supra* note 176, at 882–87 (weaving “voice” and “exit” concerns together to develop an anti-Madisonian legitimation of local decision making); Gillette, *supra* note 202, at 944–45 (noting that ease of exit at the local level “underlies de Tocqueville’s esteem for decentralized administration” and that “exit from a locality that has acted invidiously is largely salutary, as it informs the original municipality that its policies require reform,” though acknowledging the limits of the exit option in forcing changes in local decisions).

dangers of "factional combinations" and majoritarian tyranny in smaller polities has long posed a potent political counterweight to the Jeffersonian tradition of favoring the decentralization of power to local governments.²⁵⁵ Following Madison, political scientists have contended that dissenters find it more difficult to express their disagreements with political decisions and maintain their opposition in the face of majority pressures in smaller polities²⁵⁶ and that smaller governments are more subject to factional domination than bigger or more populous jurisdictions.²⁵⁷

Contemporary participation theorists, however, rely on the ease of exit from local governments to mitigate the tyranny latent in small units. Frug uses the economists' analogy of the city to the firm to argue that city politics are not coercive but voluntary since "no one is forced to live in a particular city any more than he is forced to work for, buy from, or invest in a particular corporation. . . . In both cases, we can select which entity we prefer."²⁵⁸ It is easier to leave a particular city than the political or economic systems of the whole society.²⁵⁹ The arguments of Carol Rose for broader local discretion in land-use regulation and of Clayton Gillette for greater use of plebiscites in community decision making follow a similar structure of combining the values of "voice" and "exit": the greater possibility for participation and a more communitarian political process at the local level provide the affirmative argument for new local authority, while ease of exit answers the Madisonian criticism of small units and takes some of the sting out of the danger of majoritarian oppression at the local level.²⁶⁰

Conversely, some economists have relied on "voice" considerations to bolster their claim that local governments, because of their relatively small size, will be more efficient in meeting citizen public service preferences than higher level units. Bish and Ostrom, for example, note the value of small units in promoting participation, which permits people to indicate their public service demands to decision makers

255. See, e.g., A. Syed, *The Political Theory of American Local Government* (1966). According to Madison:

the smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.

The *Federalist*, No. 10, at 83 (J. Madison) (C. Rossiter ed. 1961).

256. See, e.g., R. Dahl & E. Tufte, *supra* note 214, at 89–109.

257. See, e.g., G. McConnell, *Private Power and American Democracy* (1966).

258. Frug, *City as Legal Concept*, *supra* note 6, at 1135.

259. See *id.* at 1135–36; see also Frug, *Empowering Cities*, *supra* note 6, at 560 ("[I]t would be a mistake to overstate the contrast between the free choice and participation theories of democracy . . .").

260. See, e.g., Gillette, *supra* note 202, at 944–45; Rose, *supra* note 176, at 886.

more precisely, improving government efficiency.²⁶¹ Voice can supplement exit in promoting citizen satisfaction with public services, and these economists agree with the participationists that voice most readily occurs at the local level.

Despite the convergence of participation- and efficiency-based arguments in support of local autonomy, and the occasional analytic support each theory gives to the other, the two approaches differ in their assumptions and in their reasons for valuing local power. Although the two theories are not in direct conflict, an examination of each theory from the perspective of the other may be a useful heuristic device to evaluate their claims. As we shall see, however, when taken together, each theory compounds, rather than ameliorates, the flaws of the other. The two localist theories, whether contrasted or combined, demonstrate the uncertain nature of the case for localism.

a. *Political Localism and the Economic Model.* — The legal, political and social data that confirm the descriptive accuracy of Tiebout's theoretical axioms about the local setting illuminate two major weaknesses in Frug's theory: Frug both misconceives the scope of local lawmaking power and fails to address the significance of the multiplicity of local governments and interlocal mobility.

Frug asserts that localities are legally powerless. This is important to his argument since otherwise it would be difficult to account for the low level of popular participation in local politics. Indeed, much of Frug's article is an historical and legal account of the loss of local autonomy in the United States.²⁶² Yet a fundamental premise of the Tiebout hypothesis is that localities possess substantial discretion over local taxing, spending and regulatory decisions. Although this premise usually passes unstated,²⁶³ Tiebout's theory would make no sense without it, since it is this discretion that allows local governments to respond to consumer-voter preferences. Mobile citizens and multiple local governments would have little economic significance if each locality simply executed the decisions of a higher level government or if local decisions were regularly superseded by state or federal action.

As Part I of this Article indicates,²⁶⁴ the economists' assumptions come far closer to capturing the scope of local legal authority than does Frug's assertion of city powerlessness. Local governments have substantial autonomy in deciding the size and distribution of local budgets, setting tax rates and regulating local land use. The states generally grant localities broad discretion, and as a rule state courts and legisla-

261. See R. Bish & V. Ostrom, *supra* note 147, at 24.

262. See Frug, *City as Legal Concept*, *supra* note 6, at 1080–1120.

263. Economists generally do not address explicitly the scope of local legal authority, but one legal scholar of local government who follows the economic perspective has noted the relatively broad authority of local governments, particularly with respect to the power to participate in business activities. See Ellickson, *Cities*, *supra* note 7, at 1568–73.

264. See Briffault, *supra* note 1, at 6–18.

tures have been reluctant to interfere with local autonomy in these important areas. State incorporation and annexation laws facilitate the formation of new governments with the full panoply of local powers while inhibiting the expansion of older governments or the consolidation of localities into metropolitan or regional units.²⁶⁵ In short, the economists' basic premise about local legal power captures local government law in practice; Frug's assertion of "city powerlessness" does not.

Tiebout's assumptions about the number of local governments and the mobility of people also have considerable contemporary validity. Focusing only on general-purpose governments, one study of the twenty-five largest urbanized areas found that in twenty-one areas there were twenty or more local governments; in twelve areas there were more than fifty local governments; in six areas there were more than one hundred local governments.²⁶⁶ Another researcher found that in only two metropolitan areas did the central city account for as much as half the metropolitan area population and in most cases the central city's share of population was forty percent or less.²⁶⁷ Nor was there a concentration of land or population in a relatively small number of large suburbs.²⁶⁸ Instead, most urbanized areas are fragmented into numerous general-purpose jurisdictions, and "[m]ost people who live in large metropolitan areas do have several local governments in whose jurisdiction they could realistically live."²⁶⁹ As for mobility, since the 1950s approximately twenty percent of American households have moved each year.²⁷⁰ Over a five-year period nearly half of all families change their residence at least once.²⁷¹ Although the majority of moves are to new homes within a few miles of the original residence, many moves, including some involving relatively short distances, entail changes in political jurisdiction.²⁷²

265. See section B.1, *supra*.

266. See Fischel, *Is Local Government Structure in Large Urbanized Areas Monopolistic or Competitive?*, 34 *Nat'l Tax J.* 95 (1981). The study, based on the 1970 census, found that the 25 largest urbanized areas accounted for 60% of the population in all 248 urbanized areas, or more than one-third of the total United States population. The urbanized areas with the most general-purpose local governments—Fischel included only those local governments with zoning authority—were New York (399), Minneapolis (180), Chicago (178), Philadelphia (166), St. Louis (116) and Los Angeles (104).

267. See A. Hacker, *supra* note 21, at 26–27 (1980 census figures).

268. See Fischel, *supra* note 266, at 96, 101–02.

269. *Id.* at 102. This is especially true in the Northeast, the North Central States and the West.

270. See Hawley, *Urbanization as Process*, in *Handbook of Contemporary Urban Life*, *supra* note 157, at 3, 13; see also M. Baldassare, *supra* note 22, at 190–91.

271. See A. Hacker, *supra* note 21, at 263 (between 1975 and 1980, 45.2% of families containing married couples changed their residence at least once).

272. See M. Baldassare, *supra* note 22, at 191; A. Hacker, *supra* note 21, at 263. According to Hacker, of the 45.2% of families that moved in the 1975–1980 period, 24.2% moved within the same county, and 19.2% either changed counties or moved to another state. (Another 1.8% moved to the United States from overseas.) Although

The large number of local governments and the mobility of local residents lessen both the significance, if not the likelihood, of local political participation in two ways. First, the impact of participation is reduced when the multiplicity of local governments and the resultant interlocal competition narrow the scope of local politics.²⁷³ Second, the multiplicity of local governments and the interlocal mobility of people together undermine the notion that local communitarian feelings will inspire residents of local governments to greater participation than is likely to occur at the state or national level. The bonds linking transient residents to their localities may be weak, and the sense of belonging to a particular place may be attenuated by the multiple linkages each resident has to other jurisdictions.

Although Frug puts the case for participation primarily in terms of the psychological and emotional benefits of individual involvement in political life, latent in his theory is the assumption that city power will somehow transform local politics in the direction of greater social justice. His specific proposals—that cities operate banks, insurance companies and other financial institutions, provide housing, create food cooperatives and run profit-making businesses²⁷⁴—reflect the idea that such municipal activity would radically transform local political life and provide a basis for empowering workers, the poor and consumers.

Thus, he suggests that a municipal bank or insurance company “might make different judgments about the relative value it places on the profit margin, the kinds of loans it deems socially useful, and the kinds of consumer protection it seeks to provide” than would private lenders.²⁷⁵ Municipal ownership of housing “could prevent gentrification of these units, and encourage democratic control over the operation of multiple-family housing.”²⁷⁶ City-owned enterprises could lead to the manufacture of socially useful products and provide opportunities for experiments in worker self-management.²⁷⁷ In short, Frug suggests, greater individual participation in urban government would lead to more redistributive local governments.

But it is highly unlikely that greater local participation would have such a transformative effect.²⁷⁸ The multiplicity of localities and the

Hacker gives no further information concerning intracounty moves, it must be assumed, given the large number of municipalities in most counties, that a significant fraction of these moves involved a relocation from one municipality to another. But cf. Sharp, “Exit, Voice, and Loyalty” in the Context of Local Government Problems, 37 W. Pol. Q. 67, 70 (1984) (a large number of movers are repeat movers).

273. See, e.g., T. Gurr & D. King, *supra* note 32; P. Peterson, *supra* note 31.

274. See Frug, *City as Legal Concept*, *supra* note 6, at 1150; Frug, *Property and Power*, *supra* note 203, at 687–91.

275. Frug, *City as Legal Concept*, *supra* note 6, at 1150.

276. Frug, *Property and Power*, *supra* note 203, at 688.

277. *Id.* at 688–89.

278. This discussion is intended to address the likelihood of local adoption of new social or economic programs, not the desirability of Frug’s goals or the efficacy of his specific proposals in promoting those goals. Nevertheless, it may be worth noting that

mobility of people and capital that Tiebout describes and that exist today seriously erode the capacity of most cities to undertake new programs that would impose costs on already straitened local budgets and that are likely to be perceived as benefiting the poor or municipal workers at the expense of business and middle- and upper-income interests. Corporate and upper-income residents are the city residents most sensitive to changes in local taxes and the quality of urban services. It is relatively easy for affluent people and businesses who feel dissatisfied with municipal tax and spending policies to leave the city, become residents of adjacent communities and continue to have ready access to the city as a place to work, shop, sell and enjoy recreational and cultural amenities. Officials in city governments know this, and the range of political choices available to them is accordingly constrained.

Contemporary cities, as a rule, do not engage in innovative redistributive programs, not because they lack the legal authority, but rather because they fear that initiating such programs would cause residential and commercial taxpayers to depart.²⁷⁹ It is debatable whether progressive social programs and redistributive policies caused the urban fiscal problems of the 1970s,²⁸⁰ but undeniable that urban politics in the major cities in recent decades has been dominated by concerns

most publicly owned or operated enterprises have not realized their radical potential, but rather are run much like private enterprises in the same industries, as low-risk, profit-oriented activities. See A. Walsh, *The Public's Business: The Politics and Practices of Government Corporations* 155-57 (public authorities are overly sensitive to concerns of private financiers such as minimizing investor risk), 233-39 (widespread mismanagement in government agencies) (1978); Berkowitz, *Economic Development Really Works: Baltimore, Maryland, in Urban Economic Development*, *supra* note 35, at 201, 209-21 (urban economic development program's reliance on public-private partnerships); see also D. Henriques, *The Machinery of Greed: Public Authority Abuse and What to Do About It* 7 (1986) (public authorities are subject to corruption).

279. See P. Peterson, *supra* note 31, at 37-38, 64, 167-68, 182-83; W. Tabb, *The Long Default: New York City and the Urban Fiscal Crisis* 37-40 (1982). According to Tabb, local governments are

under continual pressure *not* to redistribute from the rich to the poor. . . . "[M]oney providers" will leave if the "service demanders" want more than the providers wish to provide. In a competitive economy, therefore, local governments must give less to demanders in order to satisfy providers. If they fail to do so, some other jurisdiction will.

280. Rubin outlines the theories explaining the 1970s' fiscal crises, including migration of poor blacks and Hispanics to big cities; exit of middle- and upper-class people and jobs and consequent erosion of tax base; growth of city bureaucracies and institutional impetus to greater city spending; and increased vulnerability of city political coalitions to demands of groups seeking higher levels of spending on social programs. See I. Rubin, *Running in the Red: The Political Dynamics of Urban Fiscal Stress* 5-12 (1982); see also R. Bailey, *The Crisis Regime: The MAC, the EFCB, and the Political Impact of the New York City Financial Crisis* 3-4 (1984) (linking the New York City fiscal crisis to growing gap between revenues and expenditures, inability to raise money in private capital markets, and long-term decline in manufacturing employment); C. Morris, *The Cost of Good Intentions: New York City and the Liberal Experiment, 1960-1975*, at 238-40 (1980) (treating the New York City fiscal crisis as a result of public sector expansion and municipal budget manipulation); T. Swanstrom, *supra* note 32, at 163-71 (hostility

about credit ratings, balanced budgets, lower taxes, basic infrastructure and curtailing expectations about urban government.²⁸¹ Such concerns are far more important than limits on local legal powers in restricting the ability of cities to pursue progressive social agendas.

Although the rise to power of black and Hispanic mayors in most of the nation's largest cities and the switch from at-large to district representation in many city legislative bodies has increased the role of minority and neighborhood interests in urban government, the imperatives of protecting the local tax base and maintaining access to capital markets continue to structure urban politics.²⁸² New political coalitions have reallocated patronage, integrated municipal workforces and made marginal adjustments in spending on established services,²⁸³ but there has been relatively little change in the size of the municipal public sector or the role of city government in the urban polity or economy. Here, as elsewhere, the choices open to local governments re-

among local business interests to Mayor Kucinich's populist programs contributed to Cleveland's 1978 default).

281. See, e.g., W. Tabb, *supra* note 279, at 97–100 (New York City gave tax abatements for building rehabilitation projects while reducing funding for programs to benefit low-income residents). According to Mollenkopf, “the competition among local jurisdictions to offer the best political climate for new investment produces a Gresham’s Law’ effect. Public-service-poor jurisdictions have tended to drive out public-service-rich jurisdictions. This dynamic has restricted the ability of either type of jurisdiction to deal with pressing urban problems” J. Mollenkopf, *supra* note 121, at 253. Thus, market discipline has reduced government burdens on the private sector while increasing urban distress. See *id.*; see also R. Bailey, *supra* note 280, at 172 (“Whereas government might once have used what few ‘slack’ resources it had in attempts to reintegrate alienated groups into the political system, now it must spend them on keeping business in New York.”); M. Shefter, *Political Crisis/Fiscal Crisis: The Collapse and Revival of New York City* 234 (1985) (“[M]ost participants in urban politics regard the imperative of maintaining access to the capital market as akin to a law of nature”); Swanson, *Semisovereign Cities: The Politics of Urban Development*, 21 *Polity* 83, 107 (1988) (“land interests, in coalition with growth-oriented politicians” play substantial role in shaping city economic policies.).

282. See, e.g., P. Heilig & R. Mundt, *Your Voice at City Hall: The Politics, Procedures, and Policies of District Representation* 133–48 (1984); Elkin, *State and Market in City Politics: Or, The “Real” Dallas*, in *The Politics of Urban Development*, *supra* note 36, at 25, 25 (“Diversifying participation in electoral politics does not alter development policy in any simple or direct way. Instead it leads to a reconstitution of the urban regime.”); Reed, *A Critique of New-Progressivism in Theorizing About Local Development Policy: A Case from Atlanta*, in *id.* at 199, 199–215 (economic reality forced Atlanta’s first black mayor to accommodate traditionally powerful white private interests).

283. There remains substantial debate over whether increased minority success in winning municipal office results in a greater minority share of municipal jobs. See generally Mladenka, *Blacks and Hispanics in Urban Politics*, 83 *Am. Pol. Sci. Rev.* 165 (1989) (reviewing the literature and arguing that minority success in entering public employment and gaining a greater share of public sector resources is subject to considerable regional variation and linked to other aspects of the local political structure).

main limited by economic, not legal, factors.²⁸⁴

Developments in transportation, communication and production technologies have increased the ease of movement of both people and capital. The locational advantages cities once possessed, in terms of the presence of large markets and proximity to rivers and railroads, are of decreasing significance in the age of aviation, computers and the electronic and telephonic transmission of data and documents. As a result, interlocal competition for businesses and affluent residents has intensified,²⁸⁵ city tax bases have become more fragile and cities' fiscal capacities to carry out their current public service functions, let alone implement progressive innovations, are more severely stressed.²⁸⁶

284. See, e.g., D. Judd & R. Ready, *Entrepreneurial Cities and the New Politics of Economic Development*, in G. Peterson & C. Lewis, *Reagan and the Cities* 209, 218-37 (1986) (discussing attention to economic development incentives in Denver after the election of its first Hispanic mayor and Chicago after the election of its first black mayor). See *The Politics of Urban Development*, *supra* note 36.

285. Ira Katznelson quotes former New York City Mayor Edward I. Koch as saying " 'The main job of municipal government is to create a climate in which private business can expand in the city to provide jobs and profit.' " I. Katznelson, *supra* note 211, at 4.

Several studies have found that, despite the rush to provide tax abatements, low-interest loans and parcels of land, corporate investment and plant location decisions generally turn on factors beyond the control of local governments, such as the presence of a network of suppliers, prevailing wage scales or the degree of unionization. "Nevertheless, public officials desperate for jobs and tax dollars are understandably reluctant to risk losing a source of revenue by offering fewer concessions than their ever-present competitors; although they can't afford to offer the tax reductions, they can't afford not to." Jones & Bachelor, *Local Policy Discretion and the Corporate Surplus*, in *Urban Economic Development*, *supra* note 35, at 245, 249; see also Blair & Wechsler, *A Tale of Two Cities: A Case Study of Urban Competition for Jobs*, in *id.* at 269, 269-82 (analogizing the competition between Springfield, Ohio and Fort Wayne, Indiana for an International Harvester plant to game of Prisoner's Dilemma in which "the combined welfare of residents . . . would have been maximized if neither city had offered International Harvester financial incentives," but in fact both cities offered large assistance packages). But cf. Markusen, *Class and Urban Social Expenditure: A Marxist Theory of Metropolitan Government*, in *Marxism and the Metropolis*, *supra* note 88, at 82, 95-96:

The movement of industrial and mercantile establishments to suburban jurisdictions is largely a response to private-sector gains . . . but taxes and public services do play an important role. . . . The existence of fragmented political units allows corporations to play off one jurisdiction against the other to secure preferential tax and expenditure arrangements

286. See, e.g., M. Castells, *City, Class and Power* (E. Lebas, trans.) 25-26 (1978); W. Tabb, *supra* note 279, at 69-75.

Federal policies over the last decade have accelerated the dynamic of interlocal competition. Drastic cuts in assistance to cities have thrown the cities ever more on their own resources, while federal tax cuts have served to highlight differences in local tax rates, increasing the pressure on relatively high-tax jurisdictions to keep taxes down, even if this limits the local capacity to fund social programs. In 1987, federal aid for just 13.6% of state and local revenues, down from 18.7% in 1978 and the lowest figure since 1966. See *Federal Aid to States, Localities Hits 20-Year Low*, *Wash. Post*, Nov. 23, 1988, at A19, col. 1. The federal share of state and local revenues had declined from a high of 18.7% in 1978. See *id.* On the significance of federal cutbacks for local autonomy, see T. Gurr & D. King, *supra* note 32, at 189-90.

The watchword in urban politics in the last decade has been “economic development.”²⁸⁷ Cities have indeed been innovative in using and stretching their legal authority in pursuit of economic growth.²⁸⁸ The “public purposes” for which cities may spend, borrow, lend and condemn have been expanded, but more often than not the goal of expanded city powers has been to frame public policies that will retain old businesses, attract new investment and promote gentrification rather than reform urban life or empower ordinary citizens.²⁸⁹ Cities already have sufficient legal authority to intervene broadly in economic life, take on traditional business functions and pursue ambitious social programs.²⁹⁰ But the economic constraints on urban politics deriving from the multiplicity of local governments and the mobility of people and businesses are structural, and they make the municipal pursuit of private capital a far more likely prospect than the adoption of a pro-

287. According to a study prepared by the National League of Cities, local governments “expend tremendous energies maintaining and enhancing their economies.” A. Bowman, *The Visible Hand: Major Issues in City Economic Policy* 7 (NLC Working Papers, Nov. 1987). Indeed, of 326 mayors surveyed by Bowman, 86% identified economic development as one of their top three priorities, and 36.5% said it was their highest priority. See *id.* at 8.

288. As Bingham and Blair have concluded,

[T]he creativity of local development officials has been substantial. But the creativity has been directed at developing new (and complicated) arrangements between governments, businesses, and third sector organizations. The variety of subsidy/compensation schemes is enormous. However, the idea that a better city can be achieved by more jobs, money, tax revenues, and so forth is entrenched in local economic development efforts.

Bingham & Blair, Introduction, *in* *Urban Economic Development*, *supra* note 35, at 11, 13.

289. See, e.g., *Common Cause v. State*, 455 A.2d 1 (Me. 1983) (bond issue to rebuild harbor facilities to keep shipbuilding company in state); *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) (condemnation of populous residential neighborhood to attract auto assembly plant); *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d 478, 335 N.E.2d 327, 373 N.Y.S.2d 112 (1975) (condemnation for urban redevelopment), appeal dismissed, 423 U.S. 1010 (1975). But cf. *Purvis v. Little Rock*, 282 Ark. 102, 667 S.W.2d 936 (1984) (“tourism bonds” to finance motel construction invalid for lack of adequate public purpose). Cities have also adopted progressive measures linking economic development to payments for necessary municipal improvements. See, e.g., *Russ Bldg. Partnership v. San Francisco*, 44 Cal. 3d 839, 750 P.2d 324, 244 Cal. Rptr. 682 (1988) (development fee on new office construction to help fund mass transit), appeal dismissed, 109 S. Ct. 209 (1988).

290. The intensity of the interlocal competition for new investment illustrates both the breadth of local legal authority and the fragility of local economies. Interlocal competition is possible only because localities have the policy-making discretion to pursue programs to attract industrial and commercial concerns; interlocal competition is necessary primarily because of the mobility of capital. See *Jones & Bachelor*, *supra* note 251, at 263–65.

gram of municipal socialism.²⁹¹

Beyond narrowing the range of local political choices, the multiplicity of local governments and the mobility of people casts doubt on the assumption, fundamental to participation theory, that local autonomy and the spirit of community are mutually reinforcing—that participation will be stronger in local governments because localities are communities. Many writers treat “local government” as a synonym for “community.” As is true with the frequent equation of “local government” with “city” discussed in Section A, above,²⁹² the legal term “local government” has become freighted with the powerful social, political and emotional associations that ordinarily accompany the word “community.”²⁹³ For participationists, local governments are communities—places where an individual’s activities and experiences are bound up with those of her neighbors, where repeated interactions and daily communications breed interdependence, shared feelings and values and a public-spirited commitment to the community’s well-being.²⁹⁴ This sense of community is said to provide an incentive to participate in local affairs and to ease participation by providing residents with an awareness of how much they have in common, thereby facilitating community decision making.

But the connection between today’s local governments and the spirit of community is tenuous. One cannot, of course, find a standard metric to gauge the sense of community. If, however, as some urban sociologists contend, “the single most important variable leading to stronger social bonds is length of residence”—more than social class or

291. See, e.g., P. Peterson, *supra* note 31, at 167–83 (realities of local politics preclude widespread implementation of redistributive programs); Clarke, *supra* note 36, at 107–09 (same).

Of course, interlocal economic competition does not strictly determine local political decisions. There is “[s]lack in the intergovernmental marketplace [that] creates room for political discretion.” Swanson, *supra* note 281, at 95. “Local decision makers do not simply follow the imperatives that emanate from the national political economy; they must also interpret those imperatives, apply them to local conditions, and act on them within the constraints of political arrangements they build and maintain.” Stone, *The Study of the Politics of Urban Development*, in *The Politics of Urban Development*, *supra* note 36, at 3, 4. Local politics involves the particularities of time, place and specific political actors, and cities may find opportunities to implement progressive innovations within the structural constraints of interlocal economic competition.

292. See *supra* text accompanying notes 6–10.

293. As Raymond Williams has noted, although “community” may have many definitions, the term “seems never to be used unfavourably, and never to be given any positive opposing or distinguishing term.” R. Williams, *Keywords: A Vocabulary of Culture and Society* 66 (1976). Albert Hunter agrees that among social scientists “community [is] an unqualified good. The positive connotations of friendliness, warmth and support are seldom countered . . .” Hunter, *Persistence of Local Sentiments in Mass Society*, in *Handbook of Contemporary Urban Life*, *supra* note 157, at 133, 134–35.

294. See, e.g., R. Wood, *supra* note 24, at 102–08 (suburban government seen as enhancing “community”).

stage of life²⁹⁵—then the high rate of interlocal mobility suggests that community bonds within localities cannot be very strong. We are a mobile society,²⁹⁶ and the ease and frequency of relocation necessarily reduces the sense of common needs, mutual values and shared lives “community” ordinarily connotes.²⁹⁷

Furthermore, the large number of localities in each metropolitan area is a significant reminder that people are regularly involved in more than one locality in the course of their daily lives. We are not just a mobile society; we are also a commuter society. Most people no longer reside in the locality in which they work, and they no longer confine their weekly travel, shopping, social, cultural or other routine activities to the community in which they reside. The statement of a southern California woman—“‘I live in Garden Grove, work in Irvine, shop in Santa Ana, go to the dentist in Anaheim . . . and used to be president of the League of Women Voters in Fullerton.’”²⁹⁸—is emblematic of the multijurisdictional lives most metropolitan area residents lead.²⁹⁹

Some sense of interdependence and common experience, of shared values and mutual knowledge and sympathy, no doubt remains. Clearly, however, this sense cannot be as strong as participation theorists contend when so many communities are composed of newcomers, transients and people whose attention is often focused on issues and events outside the local jurisdiction.³⁰⁰ Participation theory, like the law, treats an individual as a member of only one local community—the

295. Janowitz & Street, *Changing Social Order of the Metropolitan Area*, in *Handbook of Contemporary Urban Life*, *supra* note 157, at 90, 111.

296. According to Daniel Elazar, one of the hallmarks of American life that has affected our urban development is the “nomadism” of the American people. See D. Elazar, *supra* note 20, at 16; see also Lemann, *Stressed Out in Suburbia*, *Atlantic*, Nov. 1989, at 34, 46 (finding that in Naperville, Illinois, a Chicago suburb, “the average house . . . changes hands every three years”; in one of the city’s two school districts “new students make up more than a quarter of the enrollment every fall”).

297. See D. Elazar, *supra* note 20, at 16 (American “nomadism” eliminates the notion of a “stable, self-perpetuating community”); cf. D. Popenoe, *Private Pleasure, Public Plight: American Metropolitan Community Life in Comparative Perspective* 149–56 (1985) (noting the particularly high level of interlocal mobility in the United States as compared to Great Britain and Sweden; recommending policies that would promote residential stability as a means of increasing sense of community).

Jane Mansbridge reached a similar conclusion in her study of the Vermont town meeting—that improved communications and mobility had reduced the political and social importance of the town in the lives of local citizens. See J. Mansbridge, *supra* note 207, at 44. More generally, she recognized that national economic changes, including increased interlocal interdependence and the expansion of scale of economic activity and social problems, made intensive local participation in town-meeting form of government a thing of the past. See *id.* at 126–29.

298. Quoted in C. Abbott, *supra* note 77, at 186.

299. See D. Popenoe, *supra* note 297, at 35–36 (the separation of work, shopping, cultural and recreational activities and residence, as well as the economic segregation of residents, are aspects of the social differentiation that dominates metropolitan life).

300. “The separation of work from residence and the concentration of daily activities outside the home and neighborhood have reduced the sense of belonging.”

one in which he or she currently resides. But other localities—places of work, schooling or shopping; places through which a person passes during the diurnal commute; places of former residence—may play an important role in the individual's life, thereby reducing interest in and involvement with the person's current home locality.³⁰¹

Despite their numerous contacts with other local governments, people remain intensely concerned with issues pertaining to their jurisdiction of residence. It is this locality that makes tax, regulatory and spending decisions that directly affect the value of one's home, the character of one's neighbors and the quality and cost of basic public services. Still, the mystic quality with which the term "community" often invests these shared interests—the hint of some organic unity of the individual and the place—is hard to sustain. The strong identification of the citizen with the local community that characterized the Greek polis, the high-medieval city and the New England town has given way to a society in which daily life is spread over a number of places. The role of any one locality in the life of the individual, the personal commitment to that locality and one's fellow feeling for other local residents must be correspondingly reduced.³⁰²

The role of mobility and the multiplicity of local governments in limiting the sense of community as an incentive to and a benefit of participation do not require us to reject participation as a political value or to deny the importance of the local setting as a focus of participation.³⁰³ But we can question whether participation would be greatly advanced by further local autonomy and whether the benefits of the increment in participation would be worth the costs additional local autonomy would impose.

Kronus, Race, Ethnicity, and Community, in *Handbook of Contemporary Urban Life*, supra note 157, at 202, 232.

301. In his comparative study of metropolitan community life in the United States, Great Britain and Sweden, Popenoe found the greatest separation of work, residence and shopping in the United States. See D. Popenoe, supra note 297, at 81–82.

302. This is just another version of Max Weber's observation that "when the city lost its walls the city ceased to be." Long, *The City as Reservation*, 25 *Pub. Interest* 22, 22 (Fall 1971) (paraphrasing Weber). As Long points out, for Weber the city began as a "bounded association, literally enclosed by walls that clearly marked it off from the outside society. Within these walls it had a life in common and a shared common purpose." *Id.* Today, "[t]he unwallled city can be safely exploited by those who can reside without." *Id.* at 36.

303. Even assuming that smaller is better, a locality would have to be quite small in order for residents to reap the full benefits of the potential for participation. Using the town meeting as a model, Dahl calculated that if a town held a six-hour meeting and limited participants to two minutes of speaking each, about 200 people would be able to actually participate in the meeting. That would be 20% of the population of a town of 1000 people—and only 1% in a town of 20,000. R. Dahl, supra note 10, at 70–71. Dahl and Tufte found that participation was best achieved in communities with populations under 8000. See R. Dahl & E. Tufte, supra note 214, at 62–65. Although most local governments are small, most people live in local governments too large to permit full participation by all adult members of the community.

Greater local autonomy would not substantially advance participation. There already is a great deal of local legal power, and the principal constraint on local power is often not legal but economic: the limits of local resources and the structure of interlocal competition. So, too, mobility and the spread of daily activities across a metropolitan area are far greater impediments to a revitalized sense of local community than any nominal limits on local legal power. As long as the social trends that have eroded the connection between locality and community ties continue unabated, it is difficult to believe that augmenting local governments' already substantial legal powers will have any significant effect on either the sense of community or the extent of political participation at the local level. At the same time, the cost of local legal autonomy, the burden it places on poorer localities and the crippling effect it has on efforts to remedy local economic and social problems, are far greater than participationists acknowledge.

b. *Economic Localism in Political Perspective*. — The Tiebout hypothesis describes the contemporary urban setting better than does Frug's theory. But the descriptive power of economic localism does not translate into a satisfactory normative justification for the enhancement of local power or even for the current broad scope of local autonomy.³⁰⁴

Tiebout's theory is one of interlocal movement. It does not address the internal operations of urban government, local political institutions or local political activity. The model provides no basis for understanding how local governments make decisions, nor is it concerned with how local residents participate in local decision making. Indeed, Tiebout's model hardly acknowledges that local governments are governments, and does not recognize the concept of local citizenship at all. Under economic localism, governments are little more than purveyors of public goods, and local residents are not citizens but "consumer-voters," and highly transient ones at that.³⁰⁵

For Tiebout, the central mechanism of citizen-government relations is departure. The individuals who drive the system and make it work are the ones who leave, are likely to leave or have recently arrived; their significance to the local polity derives from their marginal status. Although the interlocal competition for taxpayers and investors indicates that there is considerable descriptive power in this view of local government, it is unclear why we should *want* a local government system in which the critical actors are those with the weakest ties to the

304. The ensuing discussion in the text presents a normative critique of the Tiebout model; it assumes *arguendo* the descriptive validity of Tiebout's analysis. The Tiebout model, however, has been subject to considerable debate on positive as well as normative grounds. See, e.g., Lowery & Lyons, *The Impact of Jurisdictional Boundaries: An Individual-Level Test of the Tiebout Model*, 51 J. Pol. 73 (1989).

305. Cf. Clark, *Democracy and the Capitalist State: Towards a Critique of the Tiebout Hypothesis*, in *Political Studies from Spatial Perspectives* 111, 120-27 (A. Burnett & P. Taylor eds. 1981) (Tiebout's focus on the provision of local public goods and services has obscured the democratic potential of local governments).

locality and the critical decisions do not involve the structure of local decision making, the substance of local policies or the process of local political activity, but rather the decision whether or not to exit.

This conception contrasts sharply with that of participationists like Frug. Whatever the shortcomings of participation theory in accounting for the actual scope and potential of local power, its basic premise is that local governments are political institutions that decide on public issues in a manner influenced by and accountable to an involved constituency of local residents. Its critical decision makers are the residents who stay, commit time and effort to their relations with other local citizens and have a stake in the community. Participation theory recognizes, indeed is built on, the normative assumptions about local government that have long been basic to the structure of American government. At least since Jefferson and Tocqueville, the appeal of localism has been rooted in a view of local governments as "little republics"³⁰⁶—places of self-government, of collective decision making by local residents about local problems—and that such local self-determination enables local governments to serve as "primary schools" of liberty,³⁰⁷ educating and training citizens for national democracy.

The idea of local governments as governments—as centers of collective decision making rather than as firms that supply goods to the municipal marketplace—is certainly the underpinning of the legal authority of local governments. State restrictions on special commissions that would perform municipal services and on special acts relating to municipalities, state authorizations of home rule and state statutes decentralizing power to localities, all were intended to protect the integrity of local decisions, not to facilitate interlocal movement.³⁰⁸ And the ascent of local autonomy in state and federal jurisprudence grows out of a belief in democracy within localities, not in the external relations of local governments to each other or to their departing "consumer-voters."

The most emphatically localist decisions—the ones providing the firmest basis for stating that local autonomy enjoys a measure of legal protection—are based on the interest of local residents in local self-government and on the rights of local residents to participate politically in local decision making, not on their right of exit. Thus, the United States Supreme Court's response to the complaint about the malapportioned county legislature in *Avery v. Midland County*³⁰⁹ was not that plaintiffs were free to move to a jurisdiction with a governance structure responsive to their taste for the "one-person, one-vote" principle but rather that local residents have a right to be represented and par-

306. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), reprinted in 13 *The Writings of Thomas Jefferson* 394, 400 (A. Bergh ed. 1905).

307. A. Tocqueville, *Democracy in America* 63 (Bradley ed. 1945).

308. See Briffault, *supra* note 1, at 9–10.

309. 390 U.S. 474 (1968).

ticipate in the decisions of the local governments in which they reside on the basis of "one person, one vote."³¹⁰ The essence of *Avery* is that cities and counties are governments and, as such, must be structured in accordance with the principles that govern the operations of governments.³¹¹

In other cases that affirmed local control over land use and education finance—*Belle Terre*,³¹² *Arlington Heights*,³¹³ *Rodriguez*,³¹⁴ *Milliken v. Bradley*³¹⁵ and *Buse v. Smith*³¹⁶—the legitimacy of local authority and the appropriateness of local control and deference to local actions were grounded not on the availability of a choice of local governments or on the possibility of emigration but on the locally representative nature of local institutions. Local laws and policies were seen as outcomes of local democratic processes and were accordingly deserving of respect. Voice, not exit, accounts for the normative power of localism in our legal and political system because voice, not exit, more accurately reflects the commitment to self-government that is at the heart of legal localism.

Some economic theorists have recognized the anomaly of a theory of local autonomy that accords a preferred position to the most marginal residents and ignores the inner workings of local governments. These economists have sought to construct an efficiency-based theory rooted in Tiebout's model but addressed to the internal dynamics of a local polity and focused on the costs of participation and of local political action. As exemplified by Bish, Ostrom, Oates and others, this approach builds on Tiebout's assumptions but prizes primarily the smaller, more homogeneous and responsive political units that it assumes will result from the multiplicity of local governments and the freedom to move among them.

This more political version of the economic model shares Tiebout's commitment to personal mobility within a multilocal metropolitan area, since mobility and large numbers of local governments

310. *Id.* at 480. Similarly, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the ability of Tuskegee's black residents to relocate to other communities that might have shared their preferences on matters of public policy was no remedy for the denial of their right to vote in Tuskegee itself.

Not surprisingly, the leading legal scholar of urban government adopting the Tiebout perspective would overrule *Avery* and allow localities to experiment with different local governance structures including those not based on principles of equal representation and participation. See Ellickson, *Growth Controls*, *supra* note 7, at 1558–63.

311. See 390 U.S. at 480.

312. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); see Briffault, *supra* note 1, at 101–03.

313. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); see Briffault, *supra* note 1, at 104–05.

314. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); see Briffault, *supra* note 1, at 99–101.

315. 418 U.S. 717 (1974); see Briffault, *supra* note 1, at 94–96.

316. 74 Wis. 2d 550, 247 N.W.2d 141 (1976); see Briffault, *supra* note 1, at 29–31.

increase the likelihood of local homogeneity.³¹⁷ But the political version of the economic model displays conflicting concerns when freedom of movement, local autonomy and the efficiency value of local government come together. Mobility is the "crucial lever"³¹⁸ of both the Tiebout model and the more political version. Yet the shift from an external model to an internal model featuring homogeneity, citizen involvement in local decision making and local autonomy renders mobility problematic.

Mobility is destabilizing. The movement of individuals from one locality to another changes the nature of both places. The locality of departure loses people and institutions that were constitutive of that community's life; the locality of arrival must absorb people whose values, needs, interests, ethnicity or lifestyle may differ from those of the previous inhabitants.³¹⁹ The destabilizing effect increases with numbers. A city that loses many residents may lose the resources necessary to provide the programs its residents want. A locality that receives many newcomers may find the scale of local life transformed, with attendant problems of congestion, infrastructure needs, service burdens and a loss of the quality of life that made the locality attractive to residents and immigrants in the first place.³²⁰

As a result, local residents often seek to resist mobility. The localities of departure lack the legal authority to prevent people from leaving. But the localities of arrival, through their power to regulate land use and determine the rate of investment in new infrastructure, can do much to determine the wealth, life style and, indirectly, the ethnicity of new arrivals and to control the pace of growth.

Moreover, "interlocal mobility" is not an abstraction; most movement is from the central cities to the suburbs. The typical suburb is smaller and more homogeneous than the nearby central city, suburban residents are likely to feel more threatened by change and suburban governments are more apt to adopt measures intended to retard

317. Indeed, these scholars have been even more normative than Tiebout, arguing affirmatively for the creation of more, and more specialized, governments in metropolitan areas and opposing laws that would restrict new incorporations or create area-wide metropolitan governments. See, e.g., R. Bish, *supra* note 142, at 45-62; Wagner & Weber, *supra* note 245, at 684; cf. Martin & Wagner, *supra* note 246, at 425 (concluding that California limitation on incorporation of unincorporated territory through administrative review has increased monopoly power of local governments).

318. G. Clark, *supra* note 8, at 164.

319. Tiebout's theory suggests only that new residents are likely to agree with previous residents concerning the locality's tax-services packages. Even if this is accurate, migration may create new ethnic, cultural or social divisions within the locality.

320. As Oliver Williams notes, the advantages in terms of the quality of public services and the quality of life which result from location in a particular community "must be safeguarded" by the community "for the curse of urbanism is the instability of site advantages. A variety of social institutions, of which the municipality is one, help to protect the place of advantage for its constituents and to slow down the forces of change." Williams, *supra* note 131, at 302.

change. Suburbs, themselves the products of residential mobility and ongoing beneficiaries of unimpeded interlocal commutation, are most likely to pass exclusionary ordinances that reduce mobility.³²¹

Mobility, which is pivotal to the efficiency of Tiebout's system, is in tension with the internal local efficiency prized by other economists. Mobility creates heterogeneity, bringing into a community new people with different backgrounds, different concerns, different attitudes toward the community and different expectations about local government. The new arrivals increase the size of the locality and cause new divisions within it; both changes drive up the cost of local government. Thus, some economists have endorsed local efforts to control mobility. Exclusionary zoning has value "as a mechanism for controlling the composition of the local population,"³²² thereby preserving local homogeneity, reducing disputes over the role of local government and increasing the satisfaction of the average member of the community.

But, of course, this efficiency-based claim for local policies that advance homogeneity by excluding others is in direct conflict with the economic model's commitment to the free movement of people among localities. Local policies that promote small size and homogeneity and serve the interests of current residents interfere with the ability of non-resident consumer-voters to move into the community and consequently impede the smooth functioning of the metropolitan marketplace in municipal services.

The economic argument for local autonomy, thus, contains divergent strands respecting the value of interlocal mobility. These differences are indicative of the normative difficulties of the economic analysis. Tiebout's "pure theory" is built around the structure of interlocal relations and the role of the marginal consumer-voter in revealing preferences through exit. Although it contributes to an understanding of how interlocal mobility constrains local government action, it is not a theory of local government or of the inner workings of a local polity. Its exclusive reliance on mobility means that it has nothing to say about how governments relate to those constituents who do not move or how constituents may participate in local public activities. Tiebout's pure theory yields no normative argument for local autonomy.

The second economic approach, with its more political orientation, is a theory of government based on the mechanism of public choice in the locality and the importance of homogeneity in reducing the costs of local political activity. It contributes to an appreciation of why many

321. See, e.g., Ellickson, *Growth Controls*, *supra* note 7, at 404–10.

322. Oates, *On Local Finance and the Tiebout Model*, *Am. Econ. Rev. (Papers & Proceedings)*, May 1981, at 93, 96; see also Neenan & Ethridge, *supra* note 35, at 181–82 (positing connection between "qualities of the local population" and "quality of [local] public services"; discussing effect that exclusionary zoning has on nature of local population and consequently on nature of services).

places pursue policies that aim to preserve homogeneity. But by valuing local decision making and local actions that limit or prevent the entry of would-be residents, political economy is in tension with Tiebout's basic assumption about the normative significance of mobility in enabling all individuals to satisfy their preferences for public services at the local level.

The internal cleavage within economic theory over the place of "consumer-voter" mobility in determining the efficiency of urban government signifies a further problem with relying on mobility and ease of exit in justifying local autonomy: people are not equally mobile, and exit is not equally easy for all residents. Economic theory ignores this interpersonal inequality. Indeed, economic localism in general fails to address interpersonal and interlocal inequalities. This silence produces a theory that is biased in favor of business and the affluent.

Interjurisdictional movement is not cost-free. It is constrained by a variety of economic and social factors that tend to affect poorer people more than affluent ones. First, there are the out-of-pocket costs of relocation—of picking up, selling a home or otherwise disinvesting from one's original locality, searching for a new place to live, transporting one's self and family and finding and paying for a new home. Second, most people can only reside where they have access to work.³²³ Thus, corporate investment decisions and local zoning regulations that determine the location of jobs, the education and skills requirements that determine who will be eligible for those jobs and the costs of commuting from home to workplace all limit ease of movement. Poorer, less educated potential movers will have fewer options and will be forced to bear more costs if they attempt to move.³²⁴

Similarly, people can only reside where they can afford to reside. Suburban exclusionary ordinances, such as large-lot zoning and the exclusion of multifamily and subsidized housing, drive up the cost of housing in many jurisdictions, denying many potential movers a meaningful choice of places to live. Access to jobs and access to homes are often interrelated. Suburban zoning decisions often make the communities adjacent to new manufacturing facilities, office and industrial parks or corporate headquarters economically inaccessible to all but relatively affluent people, effectively refusing poorer people both housing and employment opportunities or forcing them to endure long commutes as the price of a job.³²⁵

323. See J. Logan & H. Molotch, *supra* note 17, at 41.

324. Cf. Sharp, *supra* note 272, at 73 (mobility differs by race and, to a lesser extent, by educational level).

325. Despite the rapid movement of industry to the suburbs in recent decades, relatively little low-income housing has been built there. As a result, employment opportunities have been separated from the low-income people in the inner cities who need them most. See D. Harvey, *Social Justice and the City* 60-64 (1973).

Economic factors are not the only restrictions on movement. People are tied to their home jurisdictions by bonds of emotion and sentiment. A home is not just a house but a place with friends, family and neighbors. The home jurisdiction is not just a political unit but a familiar and dependable environment, the setting of one's daily routine, a source of physical and psychic security and a component of one's sense of personal identity. Although patterns of mobility and commutation strain the notion of community, sentimental attachments to place do exist, and the severing of personal ties is a cost of relocation and a restriction on interlocal movement.³²⁶

Residents are, to some degree, grounded by social forces.³²⁷ The relocation decisions of businesses and investors, by contrast, are usually less constrained by feelings of community or attachments to neighborhood. The economic costs of shifting capital from one place to another are also less than the costs of relocation for residents. Investors can transfer wealth across local boundaries instantaneously. Although investment in plants and equipment is less mobile, firms can cut back on maintenance and decline to modernize old plants, while gradually shifting new investments to new settings.³²⁸

Thus, investors of capital and owners of businesses, rather than residents, are the prime beneficiaries of the system of multiple jurisdictions and ease of movement. They can consider a broader array of jurisdictions as sites for investment than are available to individuals as possible new homes. These interjurisdictional shifts in investment will, in turn, determine the location of jobs, the patterns of residential migration, local economic and fiscal prosperity (or decline) and the ability of localities to provide programs that respond to the needs of local residents.³²⁹

The relative mobility of capital³³⁰ and, to a lesser degree, of more affluent residents is central to the dynamics of the contemporary in-

326. See, e.g., J. Logan & H. Molotch, *supra* note 17, at 99–110.

327. Logan and Molotch argue that social costs of relocation also have a differential impact reflecting differences in income. They contend that the disadvantaged are more tightly “tied down by the surrounding social net” and more dependent for assistance on friends, family and neighborhoods than are more affluent people. See *id.* at 42–43.

328. See *id.* at 39–40. On industrial disinvestment and relocation, see B. Bluestone & B. Harrison, *The Deindustrialization of America: Plant Closings, Community Abandonment, and the Dismantling of Basic Industry* (1982).

329. The easy mobility of business and investment means that “capital clearly will flow in a way which bears little relationship to need or to the condition of the least advantaged territory. The result will be creation of localized pockets of high unfulfilled need” D. Harvey, *supra* note 325, at 112.

330. The mobility of capital is, of course, only relative. “There is considerable friction in the movement of investment capital.” Swanstrom, *supra* note 281, at 94–95. And there are differences of mobility among various kinds of investments. For example, it is more difficult for advanced corporate services to relocate than it is for manufacturing. *Id.*

terlocal competition for new investment and new taxpayers.³³¹ The operational significance of mobility and the multiplicity of jurisdictions in shaping local government behavior cannot be denied. But it is hard to see why, given the system's built-in economic discrimination and its preference for capital over residential consumer-voters, capital mobility and jurisdictional multiplicity should constitute a normative justification for the preservation, let alone the extension, of local autonomy. A metropolitan marketplace for municipal services in which local "firms" cater primarily to the interests of businesses and wealthy residents may enable investors and the affluent to maximize the satisfaction of their preferences for local services, taxes and regulation. Clearly, however, such a system provides fewer benefits for residents whose mobility is constrained by the economic and social costs of moving and by local exclusionary regulations.

The importance of economic and social inequalities in calling into question the normative value of the Tiebout hypothesis cuts deeper than the class- and wealth-based distinctions in ability to move. The economic model assumes that the tax, service and regulatory differences among localities are the result of variations in "tastes." In theory, one locality may prefer a municipal swimming pool, another might favor parks, a third might opt for new roads and a fourth might decide to lower taxes and spend less on local services. In fact, however, local taxing and spending decisions are often based not simply on idiosyncratic tastes but also on the stark differences in local fiscal capacity that divide localities within each metropolitan area.

As the record of the school finance cases indicates, in state after state the level of local spending on education and the quality of local schools correlated with local taxable wealth, not just with local tax rates. Wealthy communities generally spend much more per capita on their schools, but can still tax their residents at much lower rates than poorer communities, which typically tax at high rates but can still manage only relatively low levels of school spending. The small per-student amounts of school spending in poorer jurisdictions were a result not of the lack of a "taste" for education among residents of that locality, but rather of the inadequacy of local taxable resources.³³² Other

331. See *supra* note 88 and accompanying text (discussing rise of suburban industrial enclaves such as City of Industry, California and Forest View, Illinois). See R. Healy & J. Rosenberg, *Land Use and the States* 20-21 (2d ed. 1979); M. Danielson, *supra* note 24, at 46.

332. Thus, as the California Supreme Court found in *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601, (1971), although the Beverly Hills Unified School District was spending \$1232 per child while the Baldwin Park Unified School District was spending \$577 per child, the difference in expenditures could hardly be said to have been the result of Beverly Hills' greater "taste" for education. Indeed, Beverly Hills' school tax was only \$2.38 per \$100 of assessed valuation while in Baldwin Park the tax rate was more than twice as high—\$5.48 per \$100. The spending disparity was attributed to an enormous difference in assessed valuation per child—\$3,706 in Baldwin Park

studies have found that the quantity and quality of other local services also vary directly with local fiscal capacity.³³³

This is hardly surprising. Communities with larger tax bases per capita can purchase the same amount of services at lower individual tax rates. Other things being equal, where the effective tax price of a service is lower, more of the service will be bought. There is a generalized interest among local residents in services such as good schools, paved roads and safe streets. Given these common concerns it is likely that interlocal taxing and spending differences are a result less of radical differences in preferences than of the broad fiscal disparities among municipalities.³³⁴

The disparities in local fiscal capacity reduce the normative appeal of the economic theory of local autonomy in a second way. Local fiscal capacity is not so much a matter of local preferences as the result of the siting decisions of industrial, commercial and financial firms and of broader regional, national or international economic developments. Although local governments regularly seek to influence the locational and investment decisions of private firms, and may have some impact at the margin, for the most part local fiscal resources are dependent on decisions over which local governments have little control. Local wealth thus is often not a result of local decisions but rather of external forces—but the legal rules that constitute the system of local governments allow wealthier jurisdictions to reap the benefits of these external decisions.³³⁵

Interlocal differences in taxing and spending result from differences in local needs as well as from disparities in fiscal capacity. As

and \$50,885 in Beverly Hills—mitigated somewhat by state and federal aid. *Id.*, 5 Cal. 3d at 589–602 & n.15, 487 P.2d at 1244–52 n. 15, 96 Cal. Rptr. 604–12 & n.15; Briffault, *supra* note 1, at 35–36.

333. See, e.g., C. Gilbert, *supra* note 223, at 280–81.

334. According to Markusen, “If Tiebout’s view were correct, suburban political units would exhibit a wide variety of public-service packages In fact, the most striking characteristics of suburban units are their . . . nearly identical public-service mixes, with quality of service rising quite consistently with class composition of residents.” Markusen, *supra* note 251, at 83–84 (citation omitted).

Bish rejects the idea that public service levels ought to be relatively equal throughout a metropolitan area, contending that it reflects the false assumption that all individuals have identical tastes and therefore the desire to purchase the same mix of goods. See R. Bish, *supra* note 142, at 153–54. But it seems equally implausible to suppose that differences in the level and mix of basic services are not influenced by local fiscal capacity, especially in jurisdictions marked by high levels of tax but relatively low levels of spending. As Meltsner observed, “fiscal federalism . . . is a euphemism that masks local poverty” A. Meltsner, *The Politics of City Revenue* 252 (1971).

Jenny Holzer disposes of the relationship between preferences and wealth more succinctly: “Money creates taste.” See D. Waldman, Jenny Holzer, at cover, 29, 38, 39 (1989) (Guggenheim Museum exhibition catalog depicting selections from artist’s 1986 work *Truisms*).

335. See Reschovsky, *An Evaluation of Metropolitan Area Tax Base Sharing*, 33 *Nat’l Tax J.* 55, 56 (1980).

discussed earlier, older, more crowded cities, with poorer, more dependent populations have qualitatively different, and greater, demands on their local resources than do smaller, newer communities with relatively more affluent inhabitants.³³⁶ These differences in service demands are at least partially attributable to history, migration patterns, the social and economic attributes of city residents, federal and state welfare mandates, population and business concentration and the exclusionary practices of the suburbs³³⁷—all factors beyond the cities' control. Critical aspects of the size and mix of city spending programs, and the differences between the bigger cities and the suburbs, are significantly determined by past events or nonlocal forces and do not simply reflect the idiosyncratic tastes of local residents.³³⁸

Local regulatory decisions are also profoundly affected by local fiscal capacity. In affluent residential localities, land use policies often seek to limit growth. These localities do not need the additional fiscal capacity that industry would provide and affirmatively seek to avoid the fiscal drain that admitting new, less affluent inhabitants would impose.³³⁹ In other jurisdictions, where residential wealth is more limited and local fiscal capacity is based on the presence of business property, localities will pursue policies designed to attract "clean" business uses—industrial parks, research and development firms, high technology companies, shopping malls—and middle-class residents, while excluding other forms of industry and low-income residents.³⁴⁰ Poorer

336. See *supra* text accompanying notes 31–37.

337. Suburban commuters, who daily travel in and out of the city, use the city's transportation system and other services, but do not pay city property taxes, are themselves a source of central city expense. Studies have found that neither the size nor the population composition of central cities affects city operating costs nearly as much as does the number of suburbanites who commute to work in the central city. See, e.g., Kasarda, *Urbanization, Community and the Metropolitan Problem*, in *Handbook of Contemporary Urban Life*, *supra* note 157, at 27, 53. The central cities also tend to bear the costs of providing facilities like hospitals, libraries and museums which serve the region as a whole but are funded out of city, and not suburban budgets. See, e.g., M. Edel, E. Sclar & D. Luria, *supra* note 127, at 35. Although Kasarda contends that this is evidence of suburban exploitation of the central city, other scholars, noting that suburban commuters pay city sales taxes and contribute to the productivity of city businesses, find the question of exploitation uncertain. See, e.g., Neenan & Ethridge, *supra* note 35, at 182–85.

338. See, e.g., W. Colman, *supra* note 37, at 51–53 (noting that in 1970 per capita total expenditures in the 37 largest metropolitan areas were from 26% to 48% greater in the central cities than in the suburbs, and that on average city residents paid 6.7% of their income for state and local taxes while suburban residents paid 5%).

Although the fiscal austerity practiced by many cities since the mid-1970s indicates that urban tax and spending practices are susceptible of local modification and are not ineluctably compelled by an objective definition of local economic and social needs, the economic and social facts of city life still powerfully constrain municipal government. See generally *Setting Municipal Priorities: American Cities and the New York Experience* (C. Brecher & R. Horton eds. 1984).

339. See, e.g., J. Logan & H. Molotch, *supra* note 17, at 191–92.

340. See *id.* at 188–90.

jurisdictions, with limited tax bases and limited job opportunities, will often be forced by their need for tax revenue to encourage development and make efforts to attract a wide range of commercial and industrial users.³⁴¹ It is these disparities in local fiscal capacity and in local economic and social conditions, rather than free-floating variations in tastes, that tend to drive the differences in local policies.

In summary, the economic model, for all its descriptive power, fails to provide a satisfactory normative basis for localism. The critical role of mobility and the marginal “consumer-voter” in the Tiebout model does not account for the relationship of the locality, as a polity, to its residents. And the political version, which attempts to propound a theory of the internal workings of the local polity, must, in the name of small size and homogeneity, jettison the free mobility that is said to make the whole system work.

More importantly, economic localism reflects and reinforces existing interpersonal and interlocal inequalities. By accepting the pre-existing distribution of wealth, economic localism prefers the interests of businesses and investors over those of individuals and families, those of the affluent over those of the poor and those of localities with healthy tax bases over those of localities with limited fiscal capacity.³⁴² The local government system may be efficient, but if the amelioration of inequality is to remain an important value in our legal and political culture, then economic localism cannot provide a sufficient normative basis for protecting, let alone extending, local autonomy.³⁴³

341. See *id.* at 190–91. These communities may also adopt residential land-use policies that are at least partially exclusionary, as for example, by refusing to accept public or subsidized housing. But for older, less affluent communities, it may be too late to adopt exclusionary policies since there will already be substantial numbers of working class or poor people resident within the jurisdiction whom the local government is legally powerless to eject—although urban renewal at one time was an important mechanism that allowed cities to displace poorer residence. See, e.g., J. Mollenkopf, *supra* note 121, at 162–79.

342. As Yates has observed, “Tiebout’s argument is a recipe for certain disaster because most cities simply cannot compete with most suburbs for fiscally profitable residents and industries. . . . Because of their fiscal structure and service obligations, cities cannot compete (or even survive) in a system of free market federalism.” D. Yates, *The Ungovernable City* 186–87 (1977).

343. Participation theorists also pay relatively little attention to the implications of interpersonal or interlocal wealth inequalities for localism. Although local participation is said to be empowering, class and wealth differences affect the ability to participate within a locality, as well as the ability to relocate from one locality to another. See Sharp, *supra* note 272, at 72, 80 (“[C]onsidered individually, responsiveness to voice and responsiveness to potential exit each should tend to bias local government decision-making toward the preferences of the higher status group; but more importantly, the combination of responsiveness to voice and responsiveness to potential exit would, in principle, compound that bias”); cf. J. Mansbridge, *supra* note 207, at 80–82 (importance of education, status and income cleavages, particularly among newcomers, in affecting propensity to participate in New England town meeting). Moreover, differences in wealth among localities create substantial disparities in the potential scope of local

c. *Local Size and Local Boundaries: The Shared Shortcomings of Political and Economic Localism.* — Although the economic and political theories, when examined separately, fail to provide a persuasive justification for local autonomy, the two together might make the case for localism. Instead, cumulating the two theories only highlights their common shortcomings: both rest on assumptions about the relationship between local governments and the scope of local actions that reveal strong and largely unresolved tensions between each theory's central animating concerns and the actual practice of local autonomy.

Both models assume that the consequences of local actions are borne primarily within the acting locality—internalized, in the economists' term. Tiebout makes this premise express: in his idealized model, local government will be efficient only when locally supplied public services “exhibit no external economies or diseconomies between communities.”³⁴⁴ Frug makes no similar explicit statement, but for him the value of participation is that it enables people to be directly involved in the collective decisions that affect their lives.³⁴⁵ This assumes that all individuals affected by a locality's action have a right to participate in those decisions. A local government that permitted only some of its residents to participate in local politics or gave greater weight to the participation of some over others would fail the standard of participatory democracy.³⁴⁶ Yet a locality that includes within its borders only some of the people directly affected by the local government's actions should be equally problematic from a participatory perspective.³⁴⁷

Today, local borders cut across densely packed and economically and socially intertwined metropolitan areas, virtually guaranteeing that there will be externalities and that some people, namely nonresidents, will be excluded from participating in the decisions of one of the re-

programs. See Briffault, *supra* note 1, at 20–21 (discussing disparities in wealth revealed in trial records in school finance cases).

Nevertheless, since inequality is an important contemporary political concern, the failure of economic localism to address the problems of interlocal inequality provides an important political perspective on the economic justification of local autonomy. The implications of differences in local wealth for the participation-based argument for localism are discussed more fully in Section E, *infra*.

344. Tiebout, *supra* note 230, at 419; see Ostrom, Tiebout & Warren, *supra* note 247, at 837–38.

345. See Frug, *City as Legal Concept*, *supra* note 6, at 1068.

346. See, e.g., *Board of Estimate v. Morris*, 109 S. Ct. 1433 (1989) (applying one-person, one-vote standard to invalidate New York City Board of Estimate); *Hill v. Stone*, 421 U.S. 289 (1975) (municipal bond elections that required approval of concurrent majorities of all voters and all property taxpayers unconstitutional); *Avery v. Midland County*, 390 U.S. 474 (1968) (applying one-person, one-vote rule to general purpose local governments).

347. Cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (invalidating under the fifteenth amendment Alabama's redrawing of Tuskegee's municipal boundaries, which had resulted in exclusion of blacks from municipality and, consequently, denied blacks the right to vote in Tuskegee's municipal elections).

gion's many local governments though they are intimately affected by these decisions. Thus, full internalization of all local actions and full participation for all those affected by local decisions would tend to require larger local units. Yet both economic and political localism are predicated on the smallness of local governments.³⁴⁸

Localists must reconcile the conflict between large and small. A commitment to local autonomy based on efficiency requires a theory of local size that would draw local boundaries large enough to internalize costs and benefits, minimize spillover effects and achieve economies of scale, yet small enough to keep down political decision-making costs and maximize ease of relocation. A participation-based theory of local autonomy requires localities small enough to permit each citizen to engage in face-to-face dialogue with her neighbors and affect local decisions, yet large enough so that local governments would have the fiscal and administrative resources to carry out the results of local deliberations and allow participation by all those directly affected by local decisions.

Although issues of size and boundaries are critical to a theory of local government, neither economic nor political localism has a theory of optimal local size or of local boundary formation. Moreover, in practice there is an enormous variance in the size of local governments, which range in area from less than a square mile to several hundred square miles and in population from hamlets of a few dozen people to New York City, with its nearly eight million inhabitants. Surely a significant number of local governments are simply the wrong size for efficient or participatory operation. Yet neither political nor economic localism accounts for this wide range of local sizes or addresses the question of what to do about those localities that are too large or too small.³⁴⁹

Frug's writings are silent on optimal local size. He appears to embrace both large and small localities, despite the enormous differences between them.³⁵⁰ The importance of small size is a basic tenet of his

348. It is the locality's smaller size that differentiates it from state and nation; small size that reduces the costs of interlocal mobility and the internal costs of political decision making; and small size that enhances the role of the individual citizen and makes possible both individual empowerment and community-spirited decisions. See *supra* text accompanying notes 215–222, 250–253.

349. Although localists usually have more trouble with cities that are too large for optimal efficiency, see, e.g., V. Ostrom, R. Bish & E. Ostrom, *supra* note 24, at 71–73, or participation, see, e.g., D. Elazar, *supra* note 20, at 46, it has also been suggested that small towns are too small to be politically effective. See R. Martin, *Grass Roots* 42–70 (1957).

350. Frug defines "city" "to include the concepts of neighborhood and regional government," Frug, *City as Legal Concept*, *supra* note 6, at 1061, and "to refer to any other institution that exercises general governmental authority in an area smaller than, yet within, an American state." *Id.* at 1061 n.4. Thus, he "generally make[s] no distinction between cities and towns, or between them and any other local government entity." *Id.*

theory; small size is intimately connected to citizen empowerment, the incentive to participate and the possibility of community-spirited decision making. Yet Frug repeatedly uses the term "city" with all of its connotations of major urban centers.³⁵¹ He relies on the history of home rule and state interference with local autonomy, which is primarily the story of political conflict between states and big cities.³⁵² His call for cities to operate financial institutions, provide housing, create food cooperatives and run profit-making businesses is primarily a program for large cities, not small towns or residential suburbs.³⁵³

Frug apparently would not exclude New York or Chicago from the category of optimally sized local governments, even though they have larger populations than many states and some nations.³⁵⁴ These are just the municipalities with the political constituencies to support and the resources to undertake activist economic and social programs. Yet given their large populations, they are too big to realize the participatory benefits of small size and local autonomy.³⁵⁵ How a theory based on participation and small size can justify autonomy for all localities given the enormous differences in local size is never addressed.

Without formally resolving the conflicting imperatives of reduction of externalities and maximization of internal efficiency and ease of exit, the urban economists appear to prefer smaller units for most governmental functions.³⁵⁶ They contend that most economies of scale are achieved by cities of 50,000 to 100,000 inhabitants and that benefits beyond this range are often attained at too great a price in terms of increased local decision-making costs and burdens on relocation.³⁵⁷

351. The title of Frug's principal article, as well as the title of four of the five parts of that article, use the words "city" or "cities." See *id.* at 1057 (table of contents).

352. See *id.* at 1109–19.

353. See *id.* at 1150; Frug, *Property and Power*, *supra* note 203, at 687–91.

354. New York City is bigger in population than all but 9 of the 50 states. See A. Hacker, *supra* note 21, at 15–18.

355. As Robert Dahl put it, from a participationist perspective "[t]o regard the government of New York as a local government is to make nonsense of the term." Dahl, *supra* note 210, at 968.

By contrast, Dean Sandalow, writing from a Madisonian perspective sensitive to the dangers of majoritarian excess in small units, has observed that these dangers would be mitigated if home rule were limited to the big cities, whose larger and more heterogeneous populations resemble those of states. See Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 *Minn. L. Rev.* 643, 709–10 & n.263 (1964).

Douglas Yates contends that New York City is both too large and too small—too large to permit a participatory government and too small to affect the state and national forces that contribute to local problems and constrain the range of local solutions. D. Yates, *supra* note 342, at 178.

356. See V. Ostrom, R. Bish & E. Ostrom, *supra* note 24, at 153–82; Bish, *supra* note 142, at 54, 55.

357. See J. Bollens & H. Schmandt, *supra* note 85, at 232 (citing W. Henderson & L. Ledebur, *Urban Economics: Processes and Problems* 94–98 (1972)); Bish, *supra* note 142, at 153; see also D. Elazar, *supra* note 20, at 38–42 (concluding that communities

Even without developing a standard linking size and efficiency, this economic analysis implies that large cities are too big to be efficient, although calls for the actual dissolution of big cities are rare.³⁵⁸ How can a theory based on efficiency and on the connection between efficiency and small size, justify local autonomy in general when so many localities are the wrong size to be efficient?

The question of proper local boundaries adds another slant to the problematic nature of localism. Local boundaries do not simply define the size of the locality; they also determine who is left out. If local boundaries corresponded to divisions between relatively self-contained and self-sufficient communities, marked by tight economic, political and social bonds, distant or at least relatively detached from their neighbors, then the exclusionary aspect of boundaries might not be significant. Each person could then reside in and be a member of the locality that had the dominant impact on her life. But today most localities are not self-contained or self-sufficient. Nor are local boundaries typically drawn with a concern to promote efficient local operations or to include within local borders all those people with a strong stake in local decisions.³⁵⁹ Local borders enclose only small fractions of interdependent urbanized areas. As a result, local decisions regularly impose externalities on people outside the local polity who are not entitled to participate in the local decision-making process.³⁶⁰

Neither economic nor political localists give much attention to the problem of local boundaries. Nor do they attempt to justify their ac-

ranging in population from 40,000 to 120,000 are optimal for political communication and economies of scale).

358. Urban economists more commonly are content to warn against the dangers of central city expansion or the consolidation of cities with their metropolitan areas. See, e.g., R. Bish, *supra* note 142, at 79–103 (comparing costs of a consolidated metropolitan area with benefits of a fragmented region composed of smaller localities); Warren, *supra* note 245, at 193; cf. Greene & Parliament, Political Externalities, Efficiency, and the Welfare Losses from Consolidation, 33 Nat'l Tax J. 209, 215 (1980) (pointing to inefficiencies created by combining local school districts to form county-wide school district).

Daniel Elazar, an urbanist writing from an economic perspective, does urge "serious consideration" to breaking up central cities. D. Elazar, *supra* note 20, at 222. Elazar does not address the question of how slum neighborhoods would fare after such a breakup.

359. Municipal boundaries are often the product of history and reflect political and geographic concerns and considerations arising from the production, communications, or transportation technologies of the eighteenth or nineteenth centuries. Other boundaries may have originated in the self-interested schemes of developers. Municipal boundaries are usually determined by local interests and, once fixed, are usually difficult to alter. See Briffault, *supra* note 1, at 73–85.

360. Moreover, the policies of one locality may have a direct effect on the policies of another. A locality's decision to exclude multifamily housing, for example, may lead neighboring localities to adopt the same exclusionary measures in order to prevent an influx of residents from the initial excluding community. See Burnell & Burnell, Community Interaction and Suburban Zoning Policies, 24 Urb. Aff. Q. 470 (1989) (developing this hypothesis and applying it to zoning policies in the Chicago metropolitan area).

ceptance of boundaries that were laid down without concern for either participation or efficiency and that ineluctably create unfair exclusions and externalities. Instead, both are drawn to the same solutions: interlocal contracts and cooperation.

Localists argue that local governments can deal with the problems of spillovers, economies of scale and the unequal distribution of resources through a process of interlocal bargaining, accommodation, informal understandings, dialogue and compromise.³⁶¹ Localities, they maintain, can form joint ventures or special-purpose districts when the supply of services on a regional basis provides economies of scale.³⁶² Localities that are too small to provide basic services efficiently can contract to buy them from other governments.³⁶³ Interlocal service contracts can improve efficiency by eliminating the duplicative administrative and infrastructure costs that would occur if many small localities each supplied all of their own services. Negative externalities can be dealt with through bilateral bargaining and the payment of compensation.³⁶⁴

According to localism's adherents, even exclusionary zoning and the unequal resources available for public schools may be addressed through interlocal discussion and deliberation. In Frug's view, "the issue of exclusionary zoning [is] a problem of establishing a mechanism that will allow dialogue among the communities affected by the zoning action; both those excluded and those seeking to exclude must be allowed to participate in the process of resolving their interconnected housing problems."³⁶⁵ Similarly, school finance reform could be accomplished by having institutional forums in which property-rich and property-poor school districts participate as "equal[s] in working out how school funds are to be allocated."³⁶⁶

By contrast, Frug views recourse to the states, even to redress the effects of local exclusionary activity, as a threat to local autonomy to be avoided at all costs: "[e]very time a decision is made to defer decision-making responsibility to someone else, there is a loss of freedom—a loss of the ability to have a voice in determining one's own future."³⁶⁷ The state court decisions limiting exclusionary zoning and ordering

361. See, e.g., R. Bish & V. Ostrom, *supra* note 147, at 66–68; D. Elazar, *supra* note 20, at 145–47; Frug, *Empowering Cities*, *supra* note 6, at 561–63; Ostrom, Tiebout & Warren, *supra* note 247, at 831; Warren, *supra* note 245, at 193.

362. See, e.g., R. Bish & V. Ostrom, *supra* note 147, at 59–61, 99; Ostrom, Tiebout & Warren, *supra* note 247, at 838; see also *supra* text accompanying notes 128–140 (discussing special purpose districts).

363. See *supra* text accompanying notes 141–148 (discussing interlocal contracting).

364. See, e.g., Fox, *An Evaluation of Metropolitan Area Tax Base Sharing: A Comment*, 34 *Nat'l Tax J.* 275, 276–77 (1981).

365. Frug, *Empowering Cities*, *supra* note 6, at 560.

366. *Id.*

367. *Id.* at 562.

school finance reform are considered no improvement over local exclusion and interlocal inequalities, because, through those cases, "some cities have been stripped of their ability to participate in the decision making that vitally affects their interests, let alone of the ability to decide their future by themselves."³⁶⁸ Reform must come out of interlocal discussions and agreements, not state intervention.

Although theoretically attractive, interlocal cooperation has in practice been relatively narrow in scope³⁶⁹ and typically confined to matters of technical infrastructure that realize economies of scale and effectuate regional economic integration, but that have only limited implications for local wealth and social status.³⁷⁰ For services affecting local prestige and individual lifestyles, interlocal cooperation is "a function of social and economic distance."³⁷¹ Localities will tend to make agreements concerning such services only with localities of comparable status and wealth. The more socially and economically differentiated the region, the more cooperation is tied to social rank.³⁷²

Thus, localities may cooperate in providing roads, sewers, water supply, waste disposal, fire-fighting equipment and other capital-intensive projects that benefit from a regional commitment of resources and enhance the general economic well-being of the area but do not sacrifice local control over the pace and character of local development or require interlocal wealth transfers.³⁷³ With respect to those activities with the greatest significance for local wealth, status and character—land-use planning, zoning, housing, urban renewal and schools³⁷⁴—in-

368. *Id.* at 566.

369. See, e.g., J. Bollens & H. Schmandt, *supra* note 85, at 328 (the number of interlocal agreements involving suburbs "is remarkably small" because of suburban fears of becoming dependent); E. McQuillin, *Law of Municipal Corporations* § 1.53, at 79 (3d ed. 1988) ("Generally, attempts to deal with metropolitan problems through the collaboration of the municipalities concerned have not been very successful.").

370. See, e.g., Dye, Liebman, Williams & Herman, *Differentiation and Cooperation in a Metropolitan Area*, 7 *Midwest J. Pol. Sci.* 145, 154–55 (1963); Williams, *supra* note 131, at 303–05; see also *supra* notes 134–140 and accompanying text (discussing narrow topical focus of special-purpose districts).

371. Dye, Liebman, Williams & Herman, *supra* note 370, at 146.

372. See, e.g., *id.* at 154–55; Street & Davidson, *Community and Politics in City and Suburb*, in *Handbook of Contemporary Urban Life*, *supra* note 157, at 476, 476.

373. See Briffault, *supra* note 1, at 64–72.

374. Localities may sometimes cooperate with respect to education, as when localities that are each too small to run separate high schools agree to provide one jointly, but because of the close connection of schools to family class and status, and local social and cultural values, such cooperation occurs primarily between communities composed of residents of comparable income and ethnicity. See Dye, Liebman, Williams & Herman, *supra* note 370, at 149–51. Affluent school districts stoutly oppose aiding other districts. See, e.g., *Buse v. Smith*, 74 *Wis. 2d* 550, 557, 247 *N.W.2d* 141, 144 (1976) (suit by affluent school districts and property taxpayers residing in those districts to challenge state school aid plan that would require affluent districts to make payments to the state for distribution to poorer districts); Brief for 85 Public School Districts as *Amici Curiae* at 3, *Board of Educ. v. Nyquist*, 57 *N.Y.2d* 27, 439 *N.E.2d* 359, 453 *N.Y.S.2d* 643 (1982) (brief filed by affluent suburban school districts in appeal of lower court determination

terlocal cooperation is highly unusual and more commonly the product of state or federal compulsion than voluntary local action.³⁷⁵

Localities may accept some form of regional planning as long as the regional body lacks the power to effectuate its plans without local approval.³⁷⁶ Similarly, the federal or state government may create regional housing authorities, but if, as usually is the case, permission to build new housing is contingent on local cooperation, the more affluent localities will decline to cooperate.³⁷⁷ And, of course, voluntary in-

that New York school financing system was unconstitutional; principal argument of amici, as contained in a caption in their brief, is that "present system is premised on, and required by, the fundamental interest in local control of local schools"), appeal dismissed, 459 U.S. 1138 (1983).

Some metropolitan areas have engaged in voluntary city suburb interdistrict school desegregation plans, but these have usually resulted from settlements designed to avert even more intrusive court orders and have required substantial state financial support. See, e.g., *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir. 1984) (metropolitan area school desegregation plan involving consensual settlement and significant state assistance), cert. denied, 469 U.S. 816 (1984); Wells, *St. Louis Evaluates Its Pioneer Integration Plan*, N.Y. Times, June 8, 1988, at B4, col 1. More commonly, suburban school districts resist interdistrict remedies, see, e.g., *Milliken v. Bradley*, 418 U.S. 717, 728-31 (1974) (intervention by suburban school districts to oppose court-ordered metropolitan area school integration plan); *Jenkins by Agyei v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (en banc) (affirming district court's imposition of intradistrict remedy and rejection of interdistrict relief), cert. denied, 484 U.S. 816 (1987), and states resist funding remedial and compensatory programs, see, e.g., *School Bd. of Richmond v. Baliles*, 829 F.2d 1308 (4th Cir. 1987) (upholding state's refusal to fund remedial and compensatory educational programs following intradistrict desegregation program that left Richmond's schools over 86% black).

375. See, e.g., J. Bollens & H. Schmandt, *supra* note 85, at 327-28.

376. See, e.g., Lineberry, *supra* note 134, at 684-85 (metropolitan Seattle authority created to handle sewerage problems also granted enabling authority to expand into water supply, public transportation, garbage disposal, parks and comprehensive planning; but voters rejected metropolitan action on public transportation and no expansion of the authority's roles took place); *id.* at 705-06 (Minnesota Metropolitan Council created for the Twin Cities area was given taxing authority, but its operational powers were limited to planning, data gathering and research); see also M. Danielson, *supra* note 24, at 269-70 (failure of councils of governments to develop voluntary "fair share" plans for the siting of federally subsidized housing in the suburbs).

Even when local governments are given veto power, states are still reluctant to create metropolitan bodies with authority to build low- and moderate-income housing. The Minnesota legislature, which has been more progressive than most state legislatures in dealing with metropolitan problems, rejected a proposal for a metropolitan housing board with authority to stimulate and coordinate low- and moderate-income projects throughout the metropolitan area, including the power to acquire, sell and lease land. Before implementing any project, the board would have had to seek approval from the municipality involved. If approval were denied, review by a special appeals board would have been possible. See F. Bosselman & D. Callies, *The Quiet Revolution in Land Use Control* 150-51 (1971).

377. See, e.g., *Mahaley v. Cuyahoga Metro. Hous. Auth.*, 500 F.2d 1087, 1089 n. 2 (6th Cir. 1974) (52 of 56 municipalities in metropolitan Cleveland refused to accept subsidized housing), cert. denied, 419 U.S. 1108 (1975); see also *Hills v. Gautreaux*, 425 U.S. 284, 303-06 (1976) (Court relies on local right to veto public housing projects in affirming metropolitan remedy for discriminatory siting of public housing); N.Y. Uncon-

terlocal payments not tied to the provision of services, for example, as compensation for spillovers or to ameliorate wealth differences are virtually unknown.

Voluntary interlocal cooperation is tightly linked to class and status. It may realize certain economies of scale, but it is highly unlikely to resolve negative externalities, ease interlocal wealth disparities or give nonresidents affected by local exclusionary actions a voice in local decision making. This should not be surprising. Our localism gives local governments exclusive control over local resources and broad discretion in local land-use regulation, permits governments to be formed to maintain class and status differences and makes the decision to enter into an interlocal agreement itself a matter of local self-interest. Affluent localities may find it worthwhile to collaborate on matters that are perceived as having little or no impact on local status or class composition and that permit the reduction of local costs. But they have no interest in cooperation which would open them to less affluent settlers from different ethnic groups or would expose them to demands for assistance from poorer jurisdictions.³⁷⁸

In the absence of state or federal intervention to change the underlying legal rules of local autonomy within pre-existing boundaries, voluntary interlocal contract or cooperation is at best a limited solution to the local government boundary problem.³⁷⁹ Economic and political lo-

sol. Law § 6265 (McKinney 1988) (state Urban Development Corporation may not adopt any new residential projects if the governing body of municipality in which project is proposed to be built objects).

A study of the suburbs around Philadelphia found that suburban counties had refused federal assistance for the acquisition of open land to be used as parks or recreation areas because of federal requirements that the lands be open to use by nonresidents, e.g., people from Philadelphia: "better no land at all than invasion and vandalism from the central city" was the suburban attitude. C. Gilbert, *supra* note 223, at 173. Only when federal assistance was increased, with a premium for regional cooperation, did all five counties of southeastern Pennsylvania finally join in a consultative arrangement. See *id.*

378. Cf. R. Babcock, *supra* note 120, at 38. Indeed, a locality may decline to cooperate even with respect to an infrastructure matter like a mass transit system if that development is seen as a means of opening the suburbs to city residents. See, e.g., Schmidt, *supra* note 134 (Cobb and Gwinnett Counties north of Atlanta have refused to join the Metropolitan Atlanta Rapid Transit Authority (MARTA), allegedly because they fear that MARTA will bring blacks to the suburbs); Reinhold, *Plan for Rail Line Sets Suburb Against City in Los Angeles*, N.Y. Times, Oct. 23, 1988, at A22, col. 1 (residents of San Fernando Valley opposing light rail connection to Los Angeles because of fears it would lead to closer contacts between city and suburb).

379. In land use and housing, the most significant form of interlocal cooperation is the New Jersey regional cooperation agreement—the arrangement by which New Jersey's suburbs may discharge part of their *Mount Laurel* obligation by making payments to poorer municipalities for the construction or rehabilitation of housing in those cities. But the cooperation agreements did not grow out of the suburbs' recognition that their exclusionary practices were imposing costs on nonresidents and on the fiscal capacities of other localities. Nor are they a result of a dialogue among localities in which the affluent came to understand their commonalities with the poor or suddenly acknowl-

calists have no effective response to the cross-border effects and interlocal fiscal disparities built into our localism. These fiscal disparities, the inequalities in the provision of basic public services that flow from them and the exclusionary land-use policies that they inspire, are a constant challenge to localism. Local governments will not, as long as they need not, take extralocal effects into account, give a voice to nonresidents affected by local actions, internalize externalities, make compensatory payments for negative spillovers or transfer local wealth to other communities in the region to ameliorate fiscal disparities. Without federal or state intervention, so roundly condemned by localists, the pervasive problems of externalities and interlocal service inequalities reflecting tax-base disparities will certainly persist.³⁸⁰

The reliance on interlocal cooperation to redress the externalities and inequalities that grow out of the local government system—and the failure of interlocal agreements to do so—indicate the problematic nature of contemporary localism. The greater opportunities for exit and voice at the local level may make local governments more responsive to their inhabitants and may promote efficiency and public participation within local units. But most local governments today are not self-contained communities, set apart from each other. They are tightly packed together in metropolitan areas, with decisions made in one locality regularly affecting the lives of residents in neighboring jurisdictions. So long as negative externalities remain endemic, at least when viewed from a regional perspective, the efficiency of the system will remain contestable.

Localist theory also overlooks the race, class and wealth differences among localities and the accompanying tendency of many localities to be hostile to each other and to the residents of other places. Economic localism trivializes interlocal inequality into a matter of varying private tastes and preferences. Participation theory either does not see the inequality and the pattern of conflict among localities or blithely assumes the problem can be resolved through an interlocal dialogue that will lead to the transcendence of differences. As the school finance and exclusionary zoning litigations and boundary formation law reviewed in Part I³⁸¹ and the history of the emergence of the suburbs presented in section B of this Part³⁸² should suggest, however, the last thing that many localities want is to transcend differences with their neighbors.

The problems with localism become apparent when one steps back from the individual locality and from the usual contrast of the locality

edged that all localities are members of a broader community. Rather, they are the product of the *Mount Laurel* litigation and subsequent state legislative action. See Briffault, *supra* note 1, at 54–56.

380. See, e.g., F. Levy, A. Meltsner & A. Wildavsky, *Urban Outcomes: Schools, Streets and Libraries* 251 (1974) (calling for federal intervention to remedy extreme disparities in taxes paid and benefits received at local level).

381. Briffault, *supra* note 1, at 20–41, 65–69, 78–91.

382. See *supra* text accompanying notes 50–158.

with the state and focuses instead on the set of localities in a region, the differences among them and the structure of interlocal relations. This requires a return to the issues raised previously concerning the suburbanization of local government and of local government law.

E. Toward a Legal Theory for Local Government in the Age of Suburbs

1. *Local Government in the Suburbs: Participation in the Private Polis.* — Legal theory must take into account the suburbanization of local government, especially the impact of suburbanization on the nature of participation at the local level.³⁸³ The suburbs are essential to the analysis of local participation because suburbs are the future—indeed, the present—of American local governments.³⁸⁴ Moreover, suburbs constitute the principal case for participatory localism today.³⁸⁵ Suburbs are generally smaller in population and area than the larger cities, so suburban residents have a greater opportunity for direct involvement in local decisions. The legal and fiscal resources of more affluent suburbs may enable them to be more successful in attaining local goals, thus satisfying the concern that participation will occur only where governments are effectively empowered. Indeed, there is some evidence that citizens do participate more in suburbs than in cities and that suburban governments are more responsive to their residents.³⁸⁶ Suburbs may be the best hope metropolitan America has of capturing the participatory possibilities of the polis ideal, and this may account for some portion of the suburbs' appeal to prospective residents.³⁸⁷ But does the prospect for

383. Participation, rather than efficiency, is critical because the commitment to participation accounts for the powerful hold localism has on legal doctrine. See generally A. Syed, *supra* note 255; see also E. McQuillin, *supra* note 369, § 1.37, at 44 ("our country was conceived in the theory of local self-government").

384. As indicated in Section A, more people live in suburbs than in any other type of locality, and the suburban share of population, employment opportunities and national wealth continues to rise. See *supra* notes 20–22 and accompanying text.

385. Economic localism is also better suited to the suburbs. It is the large number of small suburbs, adjacent to each other and in commuting range of job prospects in many other localities in the region that economists see as validating Tiebout's theory and giving residents multiple opportunities to satisfy their preferences. Big cities are often considered to be inefficient. See, e.g., R. Bish, *supra* note 142, at 100–03; Ostrom, Tiebout & Warren, *supra* note 247, at 837. Elazar combines both the economic and political criticisms of big cities: "[Large] cities, undivided, cannot be meaningful . . . communities from either a functional or a democratic point of view." D. Elazar, *supra* note 20, at 42.

386. The higher level of suburban participation may also be attributable to the higher levels of income, education and professional attainment of suburban residents since these characteristics generally correlate strongly with political participation. See, e.g., Checkoway & Van Til, What Do We Know About Citizen Participation? A Selective Review of Research, in *Citizen Participation in America* 25, 28 (S. Langton ed. 1978) ("The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.") (quoting E. Schattschneider, *The Semi-Sovereign People* 35 (1960)).

387. Some theorists argue that the exodus from city to suburb and the suburban resistance to annexation to the central city are motivated in part by the migrants' desire for smaller, more accessible, more participatory government. See, e.g., H. Arkes, *The*

political participation even in idealized suburbs provide a satisfactory justification for localism?

For legal theory, the critical aspects of the suburban model of local government should not be a small size—Frug's concern—or ease of relocation—Tiebout's point—but metropolitan area fragmentation, the social and economic differences both among suburbs and between suburbs and cities and the resulting constraints on the range of issues on suburban political agendas and the quality of internal local political life.³⁸⁸

Suburbs, although small, are not microcosms of metropolitan areas or reflections of regional diversity. Instead, suburbs are often highly specialized by economic function,³⁸⁹ race and ethnicity³⁹⁰ and class and income of residents.³⁹¹ Race, class and income go together in suburban settlement patterns as they do in so much else of American life,³⁹² and contemporary metropolitan areas are characterized by a close connection between interpersonal and interjurisdictional economic in-

Philosopher in the City: The Moral Dimensions of Urban Politics 323–25 (1981); R. Wood, *supra* note 24, at 12–19, 102–14. Wood, in particular, defines suburbia “as an ideology, a faith in communities of limited size and a belief in the conditions of intimacy.” *Id.* at 18. Indeed, according to Wood,

[T]heory has been the crucial force that preserves the suburb. There is no economic reason for its existence and there is no technological basis for its support. There is only the stubborn conviction of the majority of suburbanites that it ought to exist, even though it plays havoc with both the life and government of our urban age.

Id. at 19.

388. As previously noted, one result of the suburbs' fragmentary nature is the inevitability of spillovers and cross-border effects. See *supra* text accompanying notes 348–380.

389. Many suburbs are residential, some are primarily industrial or commercial, but relatively few accommodate both businesses and residences. See, e.g., Logan, *Industrialization and the Stratification of Cities in Suburban Regions*, 82 *Am. J. Soc.* 333, 334, 341 (1976). Even with the significant shift of new employment opportunities to the suburbs, few suburbs that contain substantial employment include homes as well as jobs for the workers employed there. For example, “[I]n 1970 the zoning ordinances of twenty suburbs in central New Jersey set aside sufficient land for industrial and research purposes to support 1.17 million jobs, but would allow residential development to house only 144,000 families . . .” M. Danielson, *supra* note 24, at 41; see also *Southern Burlington County NAACP v. Township of Mount Laurel* 67 N.J. 151, 161–64, 336 A.2d 713, 718–19 (1975) (township with population of 11,000 zoned 29.2% of its land for industry; if land were fully utilized 43,000 jobs could be created, but no provision was made for a commensurate increase in residential use).

390. Few suburbs are racially integrated. See, e.g., W. Frey & A. Speare, *Regional and Metropolitan Growth and Decline in the United States* 258–66, 277–78 (1988). Blacks, in particular, appear to be segregated in predominantly black communities, whether inner city neighborhoods or black suburbs. Massey & Denton, *supra* note 43, at 593–94.

391. See, e.g., P. Florestano & V. Marando, *supra* note 43, at 23.

392. See *id.* This is partly attributable to exclusionary suburban land-use controls. See Briffault, *supra* note 1, at 21–22.

quality.³⁹³ Indeed, the greater the number of municipal governments in a metropolitan area—in other words, the more suburbs there are—the greater the intermunicipal inequality.³⁹⁴

The functional, racial and class specialization of suburbs sets them off from the larger cities, the larger urbanized regions in which they are located and the polis of the legal theorist's nostalgic memory.³⁹⁵ The fragmentation of heterogeneous urbanized areas into municipalities segregated by race, class and function has obvious consequences for local public services. The separation of rich from poor and of businesses from residences leads to a separation of taxable wealth from public service needs. Central cities are, of course, also marked by wide ethnic, functional and class differences among neighborhoods, but within cities services are ordinarily funded on a city-wide basis, so that all neighborhoods can call on the tax base of the entire city.³⁹⁶ Furthermore, poorer and minority residents can participate in city politics, are represented in city legislatures and influence the allocational decisions of city governments.³⁹⁷ In the suburbs, by contrast, the spatial segmentation of rich and poor and industry and homes takes on added significance, because the separated spaces are also autonomous legal jurisdictions. With municipal budgets largely dependent on the local tax base, intermunicipal wealth inequality becomes the source of signif-

393. See, e.g., J. Harrigan, *supra* note 18, at 40–41.

394. See Hill, *Separate and Unequal: Governmental Inequality in the Metropolis*, 68 *Am. Pol. Sci. Rev.* 1557, 1566 (1974).

395. The cities continue to be characterized by a mix of races, classes and economic activities. The shift of people and jobs out of the cities may have reduced their internal diversity, but they remain home to industry, commerce and residence, whites and non-whites, rich, middle class and poor. The historic small town was also a place of both homes and jobs and included people of all income levels, even if the class differentiation and ethnic diversity of the small town was much less than in contemporary urban centers. See, e.g., W. Frey & A. Speare, *supra* note 390, at 236–79.

396. There is some evidence that the quality of services within cities does not necessarily correlate with neighborhood wealth. See, e.g., F. Levy, A. Meltsner & A. Wildavsky, *supra* note 380, at 70–90 (in terms of expenditures, the schools in the poorest areas of Oakland received very high levels of city resources); R. Lineberry, *supra* note 286, at 181–86 (finding that service inequalities within cities are unpatterned, and in particular not biased against the poor). Moreover, although intracity service inequalities no doubt exist, legal theory may support a requirement that internal local expenditures be based on need or at least that equal local service levels be provided for all neighborhoods. See C. Haar & D. Fessler, *The Wrong Side of the Tracks* 194–221 (1986). But as the school finance cases indicate, it has been very difficult to establish a doctrinal basis for requiring the equalization of local tax bases or local spending across jurisdictional boundaries. See Briffault, *supra* note 1, at 24–39; see also *Milliken v. Bradley*, 418 U.S. 717, 741–750 (1974) (sharply limiting the availability of interlocal remedies for school segregation).

397. The 1982 amendment to the Voting Rights Act, 96 Stat. 131 (codified at 42 U.S.C. §§ 1971–1973c (Supp. III 1985)) has provided a particularly important impetus to the enhancement of minority representation in local governments through the restructuring of local legislatures from at-large to district election systems. See *supra* note 122.

icant differences in the quantity and quality of public services.³⁹⁸

The jurisdictional separation of wealth and need that results from the fragmentation of most metropolitan areas into a central city surrounded by a multiplicity of suburbs perpetuates interpersonal as well as interlocal economic and social inequalities. The movement of industrial and commercial firms to the suburbs, combined with the exclusionary land-use practices of many suburbs and the lack of adequate mass transit systems in most metropolitan areas, limits central city residents' access to new job opportunities and contributes to the ever-widening income gap between city and suburb. Suburban zoning makes it more difficult for less affluent people to buy homes, thereby restricting their access to the major source of wealth and equity appreciation available to most Americans and reinforcing the wealth differences between homeowners and nonowners.³⁹⁹ Most importantly, children in poorer localities are likely to receive inferior educations and thus remain at a disadvantage in the competition for jobs and income when they become adults.⁴⁰⁰

Although the fragmentary character of most suburbs has evident class-related consequences for the quality of local public services, these

398. See Logan, *supra* note 389, at 340. Poorer suburbanites, residing in communities lacking either industry or more affluent residents, have little local wealth to draw on and tax themselves at higher rates, but still cannot fund services comparable to those in richer suburbs. Poorer localities usually have greater economic and social needs than more affluent ones, but they must meet these needs out of smaller tax bases. And poorer suburbanites are often even worse off than central city residents in terms of public services since the poorer suburbs lack the commercial and industrial property still found in many large cities. *Id.* at 337-38.

399. In his study of metropolitan Cleveland, Swanstrom found that suburban segregation led not only to the uneven provision of public services but to the uneven distribution of the externalities of the metropolitan housing market—noise, air pollution, lack of open space, crime—thereby exacerbating income inequalities. See T. Swanstrom, *supra* note 28, at 69-70.

Suburban class segregation has a further regressive effect through the uneven appreciation of home values. Swanstrom found that suburban homeowners were able to monopolize the positive externalities of the housing market so that suburban home values soared while inner city home values stagnated. In 1969, the average selling price of a single-family home in Cleveland was only 53% of the average sales price in the suburbs. In 1979, the average sales price of all one- to four-family properties in the city was only 44% of the average sales price in the suburbs. *Id.*

400. See, e.g., D. Harvey, *supra* note 325, at 60-64 (discussing the distributive effects of the increasing separation of jobs from housing); J. Logan & H. Molotch, *supra* note 17, at 48-49; C. Perin, *supra* note 93, at 194 (analogizing local zoning, taxes and services to immigration restriction as the "major rationing and categorizing device" for determining access to financial, educational and social resources).

Hill found that interpersonal and interlocal inequalities were closely correlated. The greater the inequality in the distribution among families in the metropolitan area, the greater the inequality among municipalities; the greater the residential segregation by social class in the metropolitan area, the greater the inequality among municipalities; and the more segregated the distribution of housing by quality, the greater the inequality among municipalities. In addition, Hill found that the more municipal governments

may be ameliorated by intergovernmental assistance. But the fragmentation of metropolitan areas has additional consequences for the quality of local public life that are perhaps more damaging to the participationist commitment to local autonomy.

The fragmentary nature of contemporary localities—the separation of work from home and the segregation of ethnic and income groups—has two consequences for the quality of local political activity: the narrowing of discussion through the exclusion of a broad range of critical public issues from local debate and, as a corollary, a tight focus on the private economic and social concerns of local residents.

Suburban politics is the politics of residence. Suburban residents share a bit of territory and, perhaps, common social and cultural values growing out of their relationship to the local territory. But they do not have work in common. They neither work in their home locality, nor do they usually work together in another jurisdiction. The separation of residence from work means that issues relating to the organization of the economy, the role of government in regulating business, the relationship between the nature of production and distribution of the goods and services produced, the size of business profits, the structure of the work place—issues at the heart of contemporary American life—are simply off the local agenda. There is little room for the politics of the work place or the politics of the economy in residential communities.⁴⁰¹

in a metropolitan area, the greater the inequality among municipalities. See Hill, *supra* note 394, at 1565–66.

Metropolitan development appears to result in an increase in the social and economic differentiation of city and suburb. The gap in local wealth between central cities and suburbs is greatest in the oldest metropolitan areas. See, e.g., J. Harrigan, *supra* note 18, at 157–60; see also P. Florestano & V. Marando, *supra* note 43, at 17.

401. Ira Katznelson makes an analogous argument that the separation of work and residence within a large city takes work place issues off the agenda of neighborhood politics. See I. Katznelson, *supra* note 211, at 1–72. But at least in a large city—and Katznelson's book is primarily concerned with politics in one New York neighborhood—work and home are still often found within the same jurisdictions. When work and home are fragmented into two separate municipal corporations, as is the case for most suburban residents, the argument seems even more compelling.

Popenoe makes a similar point when he contends that the physical separation of work and residence into separate localities leads people to divide life into two distinct social worlds—the external world of work and the private world of home and leisure. Work is seen as a means for attaining a rewarding personal life, not as a basis for social activity. The separation of work and residence thus contributes to an ethic of consumption, not production. See D. Popenoe, *supra* note 297, at 112. This further diminishes the ability of local politics in residential areas to address seriously issues of economic organization.

The separation of work and residence was itself connected to the emergence of suburbs. As Fishman observes, “The growth of suburbia was to build into the physical environment that division between the feminine/natural/emotional world of family and the masculine/rational/urban world of work.” R. Fishman, *supra* note 51, at 62.

The separation of work and residence also makes it difficult for questions concerning the roles of government and private enterprise in the organization of the economy and the place of workers in the governance of firms to be debated in public life. The more political power is devolved to the local level, the less likely the basic components of the economic system will be addressed within the political process.⁴⁰²

Thus, more affluent residential localities become concerned about industry and the role of the private sector in the economy only when they feel threatened by the possibility that unwanted businesses or housing developments will come into their communities, where the benefits to the local tax base may be outweighed by the problems of pollution, congestion, necessary new infrastructure and potential erosion of property values. Conversely, poorer localities confront the broader economy only when they seek to attract commercial or industrial firms and are willing to accept the costs those firms impose in order to build up the local tax base. But in neither case do residents confront, in the course of local public life, the basic presuppositions about the appropriate power of business and government. As a result, localism tends to assure that what Charles Lindblom calls the "privileged position of business"⁴⁰³ in American life will remain unexamined and unchallenged.

With issues related to work and the economy off the agenda, the focus of local public life in most autonomous residential localities is on issues of residence—land use, schools and property taxes. These questions are usually addressed primarily in terms of their implications for the residents' private lives—their homes, families, privacy and personal security, the preservation of personal wealth and the creation and maintenance of an atmosphere conducive to the individual consumption of consumer goods.⁴⁰⁴ Politics is framed in terms of "family territoriality": "The motivating vision in the development of the American suburbs has been . . . that of the family preoccupied with achieving a private environment, and extending the family's personal space both within and without the house."⁴⁰⁵

In this setting, public life is often focused on the protection of private life and the insulation of home and family from broader public concerns.⁴⁰⁶ Local authority over land use, schools and taxes typically

402. The ethnic and income separation of residents into distinct localities within metropolitan areas also contributes to the inability of most local governments to address broader issues of economic and social organization. Such spatial separation exacerbates the factors like race, religion or life style that divide workers and obscure whatever class interests they have in common. See, e.g., Sawers, *New Perspectives on the Urban Political Economy*, in *Marxism and the Metropolis*, *supra* note 88, at 3, 12–13.

403. C. Lindblom, *Politics and Markets* 170 (1977).

404. See M. Castells, *supra* note 286, at 169 ("American residential suburbs . . . are powerful instruments for the stimulation of commodity consumption.").

405. Buder, *supra* note 166, at 200.

406. See K. Jackson, *supra* note 50, at 54–61, 279–80.

is deployed to secure the domestic autonomy of the family. Local control over schools permits the reproduction of family values and the minimization of the possibility that education will expose family members to alien social and cultural influences, while providing local family members with the preparation essential for future economic competition when they enter the work force. Similarly, zoning and other policies are geared mainly to the defense of the home—the family's principal investment, the center of domestic consumption and the environment for family development.

In contemporary metropolitan areas, local government in autonomous, residential localities frequently serves to mirror and extend the suburban settlement pattern of relatively deconcentrated neighborhoods of single-family detached homes.⁴⁰⁷ Much as modern culture tends to sanctify the private life of family and home as a place of refuge and a personal bastion against society, local public policies—incorporation, zoning, school finance, property taxation—defend the insulation of the family and the separation of homes. Under the suburban model, local government becomes a legal rampart for the defense of the family castle.

The privatization of the local public sector becomes more apparent and takes on a parochial edge when the segregation of people by income and race is joined to the separation of work from residence. The protection of home and family is not simply about assuring domestic privacy and individual autonomy, it also tends to become associated with efforts to preserve interlocal class differences and the economic and social benefits of residence in high-income, high-status localities.

Internally, this results in a local politics aimed at the maintenance of class and ethnic homogeneity. Local homogeneity is attained by separate incorporation, often followed by the adoption of exclusionary land-use policies. Although most common in affluent areas, exclusion is not the prerogative of the wealthy; less well-to-do communities are just as concerned about maintaining community status against the deterioration usually attributed to the influx of racial and ethnic minorities and poorer people.⁴⁰⁸ The protection of turf through the prevention of internal racial or income differentiation is an important feature of suburban politics.⁴⁰⁹ Observers of suburban life have noted, “[O]ne need only attend a few public hearings on controversial zoning changes in suburban areas to realize that the people consider their right to pass judgment upon their future neighbors as sacred.”⁴¹⁰ Similarly, the insistence on separate suburban school districts reflects a determination

407. See R. Fishman, *supra* note 51, at 185 (“The true center of this new city is not in some downtown business district but in each residential unit.”).

408. See J. Harrigan, *supra* note 18, at 259 (Philadelphia suburbs with residents of different social classes agreed on the importance of “keeping undesirables out.”).

409. See M. Baldassare, *supra* note 22, at 76–77.

410. R. Babcock & F. Bosselman, *Exclusionary Zoning* 90 (1973).

to shield local children from exposure to economic, social and cultural differences that are perceived as a threat to family values.

Externally, suburban policies frequently seek to deny the suburb's membership in the metropolitan community or its responsibility for the economic and social ills of the region, especially those of the central city. Suburbs often refuse to permit facilities necessary for the economic development or social order of the region to be located within their borders. Solid-waste disposal sites, power plants, transportation facilities, low-cost housing for area workers, shelters for the homeless, halfway houses for the mentally ill and convalescent homes for AIDS patients; all lead to cries of "NIMBY"—"not in my back yard."⁴¹¹ NIMBY is certainly not a uniquely suburban phenomenon. City-dwellers are no more altruistic than suburbanites, and the residents of city neighborhoods also frequently resist locally unwanted facilities,⁴¹² but

411. See, e.g., Winerip, *NIMBY Views on People with AIDS*, N.Y. Times, Apr. 5, 1988, at B1, col. 1. Winerip describes demonstrators in Wanaque, N.J. who protested state plans to house 120 AIDS patients at the Wanaque Convalescent Home, and quotes local civic leader as saying "We believe in Nimby too! You said it, Nimby! That's what we believe." Wanaque is in Passaic County, which has the third highest number of AIDS cases in New Jersey. *Id.* See also Feron, *3 Targeted Suburbs Fight a Novel Plan to House Westchester's Homeless*, N.Y. Times, May 15, 1988, § 1, at 30, col. 1; Glaberson, *Coping in the Age of 'Nimby,'* N.Y. Times, June 19, 1988, § 3, at 1, col. 2; Winerip, *Neighborliness, the Homeless, and Westchester*, N.Y. Times, Feb. 26, 1988, at B1, col. 1; Winerip, *There's No Room in Neighborhood for Mentally Ill*, N.Y. Times, Dec. 11, 1987, at B1, col. 1; Massachusetts Town Weighs Seceding Over a Waste Site, N.Y. Times, Feb. 19, 1984, § 1, at 84, col. 1.

412. See, e.g., Verhovek, *Neighbors Now More Likely to Oppose Jails and Shelters*, N.Y. Times, Apr. 23, 1987, at A1, col. 4.

"NIMBY" is often an unfair pejorative term. NIMBY problems may arise as a result of the failure of upper level governments—city halls or the states—to give sufficient notice to or adequately consult with affected communities or neighborhoods or to properly take into account particular local circumstances in making siting decisions. As then New York City Councilmember and current Manhattan Borough President Ruth Messinger has observed, the city government

in its role as a facility locator . . . attempts to surprise and overwhelm communities. It waits until the crisis is, quite literally, in the streets. Then it opens an ill-conceived and poorly-planned shelter, names a pier for a new prison barge, or shuts down a school literally overnight if it can. . . . Communities and community boards feel besieged, and they respond in kind. They focus all their energies on what they don't want, because no one seems the least bit interested in what they do seek. Their positions escalate and they stake them out with ferocity.

Messinger, *Framing the Issues: Land Use and Charter Revision*, in *Neighborhoods, Land Use and the New York City Charter: A Working Conference on Options for Charter Revision*, Conference Summary at 31–32 (November 20–21, 1987). Better planning—including requirements that locally undesirable land uses be fairly distributed among communities—procedures that require early consultation and measures designed to ameliorate the negative effects of new facilities on communities could go far to mitigate NIMBY attitudes. Cf. New York City Charter § 203(a) (1989) (requiring the development of criteria for the location of City facilities that "further the fair distribution among communities of the burdens and benefits associated with city facilities, consistent with community needs for services and efficient and cost effective delivery of

they usually lack the legal authority to enforce NIMBY attitudes: they may be overruled by city governments. But suburbs, as independent municipal corporations, usually have presumptive authority to exclude regionally necessary but locally undesirable facilities. States have the formal power to displace such local decision making, but such state action is unusual, and is focused more on controlling development or permitting the siting of industrial infrastructure rather than superseding local decisions that exclude facilities intended to serve the disadvantaged.⁴¹³

Suburban autonomy and the focus of suburban politics on internal concerns may contribute to a declining interest in cooperative interlocal approaches to regional economic development or the solution of the social problems of metropolitan areas. Suburbs compete with each other and with the cities to attract desirable residents and nonpolluting industries and to exclude undesirable production facilities, subsidized housing and all programs to assist the poor. In most metropolitan areas there is little interest in cooperation among municipalities concerning local taxes, schools, housing or economic development. Integrated regional policies on these matters are uncommon, as the suburbs prefer to rely on their own resources, protect their own values and shun fiscally draining and socially threatening ties to the cities.⁴¹⁴

Most striking is the emergence of what historian Kenneth Jackson calls "a new suburban consciousness,"⁴¹⁵ which denies the historic association of suburbs with their cities and treats cities and their residents with a mixture of fear and disdain. At one time, the central cities set the tone for their metropolitan areas. The city was the primary center of jobs and commercial and cultural institutions for the region. The prosperity of the suburbs was linked to that of the cities, suburbanites knew it, and suburbs cooperated with policies aimed at promoting regional interests. The movement of industry out of the city and the creation of centers of commerce and employment in the suburbs has reduced suburban dependence on the city and has made it possible for residents to deny the economic links that integrate a region.⁴¹⁶ Whereas formerly "suburban" implied a relationship to the city, it now

services and with due regard for the social and economic impacts of such facilities upon the areas surrounding the sites."); id. § 204(g)(1) (providing for community review of proposed City facilities in light of the "fair share" siting criteria).

413. See Briffault, *supra* note 1, at 67–70.

414. See, e.g., M. Danielson & J. Doig, *supra* note 47, at 5.

An extreme example of suburban efforts to separate themselves from adjacent cities is the decision of Hammond, Indiana to build a nine-foot-high barricade along its border with the city of Gary. See Schmidt, *Earthen Barrier Serves as Both Dam and Symbol*, N.Y. Times, Sept. 5, 1988, at A6, col. 3; see also *Some Rich Towns Being Walled Off*, N.Y. Times, June 27, 1983, at A12, col. 4.

415. K. Jackson, *supra* note 50, at 276.

416. See R. Fishman, *supra* note 51, at 199 (the sundering of the social and economic ties that once linked cities and suburbs and contributes to the "profoundly anti-urban" feeling of contemporary suburbs).

suggests a distinction from the city and from the problems the city has come to symbolize.⁴¹⁷ So, too, the widening gap between suburban and urban incomes⁴¹⁸ and the polarization of the races between city and suburb sharpen the suburban sense of city-suburb differences and heighten the suburban tendency to treat the city as an alien place, one which merits little assistance, support or cooperation. Local politics in the suburbs is aimed at keeping the city and its concerns out, and the law of local autonomy—the rules governing local government formation, land use, school finance and local taxation—enables many suburbs to attain these goals.

The privatization of suburban public life, the class and race homogeneity of many suburbs, the parochialization of the local relationship to outsiders and the legal rules that permit and sustain the insulation of suburbs from regional problems, all breed an ideology of localism—a belief that land-use regulation, schools and tax policy ought to be controlled locally, with the interests of local residents as the exclusive desideratum of local decision makers. Localism reifies local borders, using invisible municipal boundary lines to delimit the range of local concern and the proper subjects of local compassion and treating the creation and maintenance of local borders as a basic right.

Localism translates questions about the proper structure of government and the proper relationship between different levels of government (and between different governments at the same level) into a language of rights. The focus of local public policy on home and family and the use of local public powers to advance these private interests lead to an association of the locality with individual autonomy. Local self-government within existing borders and effective local powers

417. As Jackson points out, at one time the very name of the suburb emphasized the linkage to the city, as in East St. Louis, North Chicago and West New York, and suburbanites knew that their well-being was tied to the health of the city. Today, suburban names seek to invoke a bucolic image as distant from the city as possible. In the Chicago area there are now 24 suburbs with either "Park" or "Forest" in their names (including both Park Forest and Forest Park). In recent years, East Paterson, New Jersey changed its name to Elmwood Park, and East Detroit, Michigan became Erin Heights. See K. Jackson, *supra* note 50, at 272–73.

West Paterson, New Jersey started out its municipal life as Little Falls and renamed itself in 1914 to emphasize its proximity to the then-booming industrial city of Paterson. West Paterson is currently considering a change of name, and all of the candidates—Woodcrest Park, Westmont, Wedgewood and Great Notch—represent an increase in rusticity and a disaffiliation from Paterson's urban problems. See James, W. Paterson Wavers on Namesake, *N.Y. Times*, Feb. 1, 1989, at B2, col. 1.

418. See, e.g., Winsberg, *Income Polarization Between the Central Cities and Suburbs of U.S. Metropolises, 1950–1980*, 48 *Am. J. of Econ. & Sociology* 3 (1989) (between 1950 and 1980 considerable polarization of household income between central cities and suburbs occurred in the 37 largest U.S. standard metropolitan statistical areas; by 1980 the median share of the poorest within total households in central cities had risen to well over double the share of the same group in total households in suburbs and the share of the wealthiest households in total for suburbs rose to double that of that group's share of total central city households).

over land use and schools are treated as a right much like the personal right to privacy in one's home and to make family decisions immune from state interference.

Localism as a set of beliefs adds to the existing legal restrictions that inhibit the realignment of local boundaries to better match local wealth to local needs or the adoption of area-wide approaches to regional problems.⁴¹⁹ Local borders, once created, reinforce local identification, become a focus of sentiment and symbolism and create a powerful legal bulwark for the preservation of local interests. Localism provides a normative basis for excluding regionally necessary but locally undesirable facilities and for treating problems that originate outside local borders as unworthy of local concern or the expenditure of local resources.

The suburbanization of local government thus presents a paradox for the participationist case for local autonomy. By their size, homogeneity and power over issues of basic importance to local residents, suburbs are optimal places for participatory government. Suburbanites have greater opportunities to participate in local decision making and suburban governments are particularly responsive to the values and interests of their residents. Local autonomy empowers residents of suburban communities—but does so at great cost to other localities and to the public values participation theory holds dear.

The appeal of participation theory is the promise it offers for the transformation of public life: the vision of people actively engaged in an ongoing discussion over issues fundamental to their collective lives, reconciling their differences through dialogue and mutual accommodation and creating a community of public-spirited citizens.⁴²⁰ It assumes that local participation will provide the experience in community—regarding decision making that can provide a basis for a more participatory national political life. But participatory activity on the suburban model is unlikely to fulfill that promise or advance the realization of that goal. Many critical public issues relating to the operation and regulation of the economy and the nature and structure of work are off the suburban agenda. Greater local autonomy would make it even more difficult to raise these issues; further, the intensity of the interlocal competition for development assures that when most local governments address economic issues, they do so to satisfy the demands of business or wealthy residents.

419. See, e.g., Baldassare, *Citizen Support for Regional Government in the New Suburbia*, 24 Urb. Aff. Q. 460, 463 (1989) (survey of public opinion in heavily suburban Orange County, California found 63% of respondents opposed to governmental reorganization that would merge local and county governments into "one large county-wide government"). According to Baldassare the preference for municipal-level authority indicated "an unwillingness by residents to give away local power, even if it means a suburban-level, rather than a metropolitanwide, reorganization." *Id.* at 467.

420. See *supra* text accompanying notes 202–214. R. Fishman, *supra* note 51, at 199.

Moreover, the combination of jurisdictional boundaries with residential segregation along ethnic and economic lines contributes to the polarization of races and classes. Local approaches to interlocal or regional problems are too often shaped by an apparent tendency to adopt an "us against them" mentality. Participation in suburban local governments thus may result in the opposite of what the participationist argument for local autonomy anticipates. Instead of promoting the reconciliation of ethnic and economic differences, political participation may lead to policies and attitudes that seek to insulate the smaller, relatively more homogeneous locality and to deny its connection to a more heterogeneous nation.

Localism in this setting enables residents to believe that their range of concerns is, and ought to be, limited by local boundary lines. Poverty, crime, deteriorating school systems and the lack of affordable housing outside the home community are defined as the private, local problems of other communities and not as subjects of public concern. Local participation may drive communities apart, intensify the sense of interlocal difference and reduce the possibilities of fashioning regional solutions to regional problems.

This objection to local autonomy derives not from the potential internal oppressiveness of local majorities that troubled Madison, but rather from the function-, race- and income-segregated nature of the contemporary polis. The suburb can be a very private polis,⁴²¹ both in terms of the issues that are the focus of local politics and the desire to avoid extralocal problems. The fragmentary nature of localities and the interlocal differences in personal wealth and municipal fiscal capacity mean that local autonomy will be worth a great deal more to some localities than others. Interlocal ethnic and class differences shape local decision making, leading to the adoption of land-use, tax and spending policies that perpetuate inequities and maintain residential separation. The private nature of local public values leads to the narrowing of local politics, the disclaiming of responsibility for problems beyond local borders and the rejection of interlocal cooperation on matters of social significance. They tend to lead as well to the pursuit of localist objectives at higher levels of government.

Local autonomy, thus, should be seen as normatively ambiguous. Although it may provide opportunities for political participation and

421. Notions of what is "public" and what is "private" are, of course, endlessly debatable. Although Elazar describes the purposes of suburban incorporation as "public," I think he is making the same point about the "private" nature of suburban political activity when he states:

People sought suburbanization for essentially private purposes, revolving around better living conditions. The same people sought suburbs with independent local governments of their own for essentially public ones, namely the ability to maintain those conditions by joining with like-minded neighbors to preserve those lifestyles which they sought in suburbanization.

D. Elazar, *supra* note 20, at 31.

responsive government, local autonomy also contributes to the preservation of the political, economic and social status quo and to the privatization of American politics. In empowering some, local autonomy disempowers others. Given the political economy of contemporary metropolitan areas and the resulting implications for local politics, the contention that greater local power and a categorically localist resolution of questions of local government law would enhance the quality of American political life and create new opportunities for the advancement of a progressive political agenda simply cannot be justified.⁴²²

2. *Legal Theory and a Role for the States in Contemporary Local Government Law.* — Localism generally deprecates the states. The states are seen as too big and too remote from the ordinary citizen to permit either voice or exit, and state power is equated with excessive centralization and the loss of participation and efficiency. State governments are frequently treated as backward, rural-dominated institutions, hostile to cities and prone to intervene in local matters for partisan, political purposes. Even Robert Dahl, whose support for local autonomy is tempered by a recognition of local limitations, assumes that the states are “destined for a kind of limbo of quasi-democracy. . . . [W]henever we are compelled to choose between city and state, we should always keep in mind, I think, that the city, not the state, is the better instrument of popular government.”⁴²³

But much as the fragmentation of the contemporary metropolis into multiple local governments changes the significance of local autonomy, it also provides a different perspective on the place of the states in local government law. The states are larger and far more politically, economically and socially complex than are individual localities. States are usually demographically diverse, and include both businesses and homes. They consist of many localities, cities as well as suburbs, so that

422. The Fabian socialist H.G. Wells reached a similar conclusion in an early twentieth-century paper opposing the adoption of socialism at the local level. Wells noted that in metropolitan London the daily lives of an increasing proportion of the population straddled municipal lines—that people had become “delocalized.” A salient aspect of that delocalization was “the withdrawal of all the wealthier people from the areas that are specializing as industrial centers, and which have a rising population of poor workers, to areas that are specializing as residential, and which have, if anything, a falling population of poor labourers.” The residents of the more affluent communities belonged “to the same great community” as the city’s industrial workers, and yet “pay only the most trivial poor rate and school rate for the benefit of their few immediate neighbours, and escape altogether from the burthens of West Ham [a poor district].” Wells, *A Paper on Administrative Areas Read Before the Fabian Society*, reprinted in *Area and Power: A Theory of Local Government* 217 (A. Maass ed. 1959).

Under these circumstances, Wells determined, “to put more power, and still more power in the hands of these petty little administrative bodies that we have today, is, I submit, folly and darkness.” For Wells, the solution was the redrawing of municipal boundary lines and the consolidation of metropolitan regions into municipalities. *Id.* at 221.

423. Dahl, *supra* note 210, at 968.

an aggregation of internally homogeneous localities will constitute a heterogeneous state.

Moreover, the states have greater resources than most local governments. States contain and therefore can tax the corporations and affluent residents beyond the reach of most localities. Their larger and more diversified tax bases and superior administrative capabilities enable them to tax personal and corporate income and sales—sources of revenue beyond the reach of most localities' fiscal powers.

The states' greater geographic scope, superior fiscal resources and social and economic heterogeneity give them a greater capacity to control local externalities and address interlocal and interpersonal wealth differences. Because they include many localities, the states can internalize a wider range of decisions and can take a regional perspective on regional problems. The states are potentially subject to the political influence of low income and poor as well as affluent residents, to the demands of cities as well as suburbs. The larger size and smaller numbers of the states make it harder for taxpayers to exit their states and may reduce state vulnerability to the flight of capital. Interstate wealth and tax differences are smaller than such interlocal differences, making it more difficult for businesses to play the states off against each other and to find state tax havens.

The states in recent decades have, in fact, become somewhat more progressive, certainly when compared to local governments and the federal government. Reapportioned state legislatures and modernized state governments have experimented with innovative economic development, social services, environmental, educational and housing programs.⁴²⁴ Following the Reagan budget cuts, the states assumed some financial responsibility for many health, social service and training programs that had previously been funded by the federal government.⁴²⁵

In terms of interlocal relations, some states have taken modest steps toward addressing interlocal externalities and fiscal disparities. As noted in Part I, a number of states have adopted boundary review laws to control the formation of new localities and to limit the ability of regional fragments to separate themselves from regional problems.⁴²⁶ Several states have enacted land-use laws to control the external effects of local economic development and to require localities to take regional interests into account.⁴²⁷ The few efforts to promote interlocal cooper-

424. See D. Osborne, *Laboratories of Democracy* (1988).

425. See R. Nathan, F. Doolittle & Associates, *Reagan and the States* (1987).

426. See Briffault, *supra* note 1, at 82–83.

427. Massachusetts has adopted some restrictions on the ability of localities to exclude subsidized housing. See Mass. Ann. Laws ch. 40B, §§ 20–32 (Law Co-op. 1983). Connecticut recently established an “affordable housing land use appeals procedure for the judicial review of local actions having “a substantial adverse impact on the viability” of certain low- and moderate-income housing. Act of June 29, 1989, Conn. Pub. Act. No. 89–311, 1989 Conn. Legis. Serv. 706 (West). New Jersey's Fair Housing Act of 1985, 1985 N.J. Laws C. 222, (codified at N.J. Stat. Ann. §§ 52:27D–311–312 (West

ation in areas affecting local social status or fiscal capacity have been the results of state actions.⁴²⁸ A number of state supreme courts continue to grapple with the dilemmas of school finance reform, seeking to coax their legislatures into committing the resources necessary to fulfill state constitutional guarantees of adequate education to children in all localities while respecting the deep-seated political value of maintaining considerable administrative responsibilities at the local level.⁴²⁹ With or without the prodding of state judiciaries, some state legislatures have put more of the fiscal resources of the state as a whole into school aid formulas, thereby indirectly compelling the residents of more affluent districts to contribute to those who live in the poorer ones.⁴³⁰ Looking at interlocal fiscal disparities more generally, Minnesota has adopted a form of tax-base sharing for municipalities in the Minneapolis-St. Paul area that requires localities enjoying above-average industrial and commercial property tax growth to share a percentage of the increment with other localities, with the size of the interlocal payments turning on the population and needs of the recipients.⁴³¹

1986)), has endorsed the regional fair share principle for the location of low- and moderate-income housing and now requires affluent communities either to take steps to encourage the location of low-cost housing within their borders or to make payments to other localities.

Other states have also sought to make regional housing needs a factor in local land-use planning. See, e.g., Cal. Gov't Code §§ 65302(c), 65583(a), 65584(a), (b) (West 1983 & Supp. 1989) (local land-use plans must provide for the "locality's share of the regional housing needs . . . of persons at all income levels"); id. § 65584(a) (West 1983) (local housing plans to be developed through state-local consultation, with state agency having authority to ensure that local determinations accord with statewide housing needs). But cf. id. § 65584(d), (e) (local governments retain power to limit building permits and impose moratoria on residential construction; state's authority to revise a local government's share of regional housing need "shall not constitute authority to review, approve, or disapprove the manner in which the local government's share of the regional housing need is implemented through its housing program," id. § 65584(e) (Supp. 1989)).

428. See Briffault, *supra* note 1, at 65–72 (discussing regional contribution agreements under the New Jersey Fair Housing Act, DRI measures in Florida, Massachusetts Zoning Appeals Law and new Connecticut law).

429. In 1989, three state supreme courts invalidated their states' school finance systems; see *Rose v. Council for Better Educ., Inc.*, 1989 Ky. Lexis 55, 1989 W.L. 60207 (Ky.); *Helena Elementary School Dist. No. 1 v. State*, 769 P.2d 684, amended, 784 P.2d 412 (Mont. 1989); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). This makes 1989 the most propitious year for court-ordered school finance reform in more than a decade. In all three cases, the courts sought to combine interpretations of state constitutional education articles that would mandate "substantial equality" of educational opportunities throughout their states with continued autonomy for local school districts. See Briffault, *supra* note 1, at 36–37.

430. See id. at 59–60. State school equalization formulas tend to stop well short of complete equalization. See id. at 60–64.

431. Minnesota Metropolitan Fiscal Disparities Act, 1971 Minn. Laws c. 24 (codified as amended at Minn. Stat. Ann. §§ 473F.01-.13 (West 1977 & Supp. 1990)). The constitutionality of the Minnesota Act was sustained in *Village of Burnsville v. Onis-*

This brief summary of redistributive state programs should not exaggerate what the states have accomplished or ignore the structural limitations on state correction of the inequities endemic to localism. Only a minority of states have been active in any of these areas. Many of those prominent reforms—the Massachusetts Zoning Appeals Law,⁴³² the Minnesota Fiscal Disparities Act,⁴³³ the various state boundary review commissions⁴³⁴—were adopted some years ago and have not been emulated by other states. Although individual states continue to deliberate new school finance and land-use programs,⁴³⁵ the evidence of a nation-wide trend toward systemic reforms in these areas is tentative at best.

An irony of state legislative reapportionment is that it came too late for most cities. Decades of rural domination have ended, but in states with large metropolitan areas the principle of one person, one vote means that the largest bloc of legislators will come from the suburbs and will represent suburban concerns. This assures that legislative action, even in the direction of a greater state role, will continue to be influenced by a localist orientation and will likely leave much of the structure of local autonomy intact. State legislatures remain attentive to the suburban interest in local autonomy, particularly in land use,⁴³⁶ and state programs of intergovernmental assistance are only modestly redistributive, often providing general support for all local governments rather than directing aid to communities most in need.⁴³⁷

chuck, 301 Minn. 137, 152–54, 222 N.W.2d 523, 532–33 (1974), appeal dismissed, 420 U.S. 916 (1975); see also Reschovsky, *supra* note 335, at 55; Note, Minnesota's Metropolitan Fiscal Disparities Act—An Experiment in Tax Base Sharing, 59 Minn. L. Rev. 927 (1975).

432. Mass. Ann. Laws ch. 40B, §§ 20–23 (Law. Co-op. 1983). For a critical evaluation, see Reed, *Tilting at Windmills: The Massachusetts Low and Moderate Income Housing Act*, 4 W. New Eng. L. Rev. 105 (1981).

433. See *supra* note 431.

434. For a discussion of state boundary review commissions, see Briffault, *supra* note 1, at 82–83.

435. See, e.g., the recently enacted Connecticut low-income housing law discussed *id.* at 70 n.301.

436. State legislative departures from local land-use autonomy are more likely to involve the siting of infrastructure facilities and the control of local development that has extralocal effects than housing for low- or moderate-income people. For example, New York repealed the authority of its Urban Development Corporation to supersede local zoning in the siting of subsidized housing. See Briffault, *supra* note 1, at 68–69. Even New Jersey's Fair Housing Act is as noteworthy for its authorization to the suburbs to buy their way out of the *Mount Laurel* fair share obligation through its regional contribution agreements as for its formal acceptance of the fair share standard as a criterion for local zoning. See *id.* at 33–35.

437. One study of the states' reaction to the Reagan budget cutbacks found that to a substantial degree the states replaced the lost federal aid. The study went on to observe that the states were less likely to fund redistributive programs and tended to change the intrastate allocation of aid to provide small grants to a larger number of localities rather than aid a targeted number of needy cities, which had been the federal pattern. "[T]he stronger the redistributive purpose of a given grant program (i.e., redis-

Moreover, the states, like localities, are constrained by the mobility of capital and the decreasing significance of particular places in the location of economic activity. The fact that there are fewer states may entail longer, costlier moves than interlocal relocation, but state redistributive activity, too, is restricted by the ability of investors, industries and affluent residents to decamp to states with lower taxes and less of a commitment to redistribution. Although less pressed than many localities, the states are also in competition for economic development, investment and tax base. Progressive economic and social programs are difficult to carry out at any subnational level in an increasingly integrated national economy. But that is a problem for "our federalism" as well as our localism, and beyond the scope of this Article.

A more compelling objection to a greater state role would be that the states have always had the nominal authority to control the local government system and typically have exercised that authority by delegating power to local governments—just the phenomenon this Article has criticized. How, in other words, can states be the solution when they are the source of the problem? The answer is that what is needed is not greater state power—states already have ample underlying authority—but a greater willingness on the part of state governments to exercise that power and take a state-centered approach in policy making. States must take more active responsibility for government decisions, state and local, within their borders, either by making more decisions at a state level or by making greater efforts to ameliorate or control the consequences of interlocal inequality and the external effects of local actions. State power is not, by itself, sufficient to remedy the harmful effects of localism since state power has often been exercised to promote localism; a state-oriented perspective in state decision making is also necessary. But greater use of state power provides the essential prerequisite for controlling local autonomy. Without greater recourse to the states and greater state activism in pursuit of statewide

tributive to the poor), the less likely was it to be protected by state and local governments from the effects of cuts made in federal aid." R. Nathan, F. Doolittle & Associates, *supra* note 425, at 96. The states were more likely to fund highway, mass transit, waste water treatment programs and assistance to the elderly and less likely to replace lost federal money for welfare or housing. See *id.* at 96–98. When federal block grant rules were rewritten to give the states greater discretion in the intrastate allocation of federal funds, small towns and rural areas tended to benefit at the expense of central cities:

New state distribution decisions further reduced funding for some community services agencies; this was particularly the case in large cities. A number of the states in the sample spread the funds they received under this block grant more widely across the state, taking some funds away from big-city community action agencies that had done relatively well under direct federal administration of the program.

Id. at 80; see also *id.* at 152, 256, 278 (under state funding practices in Reagan years cities tended to lose funds relative to other areas); Briffault, *supra* note 1, at 60–64 (discussing limitations on equalizing effects of state school aid).

goals, the problems of interlocal inequities and local externalities cannot be satisfactorily addressed.

The real barrier to addressing the problems of the local government system, and the most significant constraint on state action, is not local autonomy *per se* but the ideology of localism. In theory, local autonomy is purely a matter of state legal and political decisions to vest certain state powers in local governments. Local authority, according to black-letter law, is merely a delegation from the state, to be exercised by the locality as agent on behalf of the state as principal.⁴³⁸ But, sustained by legal doctrines, embraced by powerful economic and political interests and legitimated by academic theorists, local autonomy has been transformed from a principle of administration to a faith in the decentralization of responsibility for the provision of public services and the exercise of public power. Local electorates have become the principals and local self-interest the principle governing the actions of local government agents. Localist ideology masks local power and hides the privatization of local public life behind the rhetoric of efficiency, participation, community and local self-determination. The contingency of local authority, the linkage of location to wealth, class, race and status and the parochial nature of local political activity are obscured by the nostalgia for the polis and the New England town and by abstract assumptions about the marketplace for municipal services.

Localist ideology has a hegemonic effect, imbuing localities with a belief in the justice of their freedom from extralocal concerns while crippling the willingness of states to take a statewide perspective and displace local authority when considerations of equity or efficiency make it appropriate to do so. The localist faith imposes a conceptual obstacle to the framing of public policies for the manifold economic and social ills pressing on cities, states and metropolitan areas.

Local autonomy is not always wrong; state displacement of local authority is no panacea for public policy. Although this Article has been critical of local government decision making, that is due in part to a desire to rectify the prolocal bias reflected in both state law and the existing academic literature. Many matters are, in fact, inappropriate for uniform state-wide treatment and are better suited to local decisions that reflect particular local beliefs and local needs. Many areas of public action benefit from the opportunities for experimentation that the decentralization of law-making and regulatory authority provides. It is understandable that land use and schools form the heart of local autonomy since they are closely connected to core areas of personal autonomy and many people want the locus of decision making over these matters vested in the governments they feel are closest to the community.

438. See Briffault, *supra* note 1, at 6–18; *id.* at 85–91 (federal constitutional law).

Local autonomy as community-based governance would be an attractive, indeed a compelling vision in a more equal society or even in a society composed of more racially and economically integrated communities. In such a society, interlocal wealth differences would play a lesser role in determining the quality of public services, and local participation would entail efforts to find common ground out of ethnic and economic diversity. Participation could mean empowerment for all.

But in contemporary America, where local boundaries mark racial and class inequalities as well as the divisions between jurisdictions, the value of local autonomy is fundamentally uncertain. By championing autonomy even in settings where local action without state monitoring or support is inappropriate, localism is too often a recipe for the perpetuation of injustice. The proliferation of municipalities in metropolitan areas translates race and wealth differences into territorial segregation and fiscal separation. The interplay of local incorporation law and state decentralization of fiscal and regulatory responsibilities turns poor places into poor municipalities. By forcing residents of these poorer municipalities to rely primarily on local resources and discrediting their claim to a share of the resources of the region, state or nation, localism further disempowers the weak. By enabling affluent localities and their residents to separate themselves from their poorer neighbors and by providing them with an ideology that justifies their resistance to the claims of the larger society outside their borders, localism further empowers the already powerful. Given the extent of place-related inequality in American society, an absolute commitment to local autonomy is not a basis for a progressive social transformation but rather can be an obstacle to efforts to reduce inequality and ameliorate class and race antagonisms.

Rather than seeking a state-local relationship characterized by either complete state dominance or one of complete local autonomy, elements of both perspectives should be combined. We must strive to develop legal doctrines and governmental structures that combine local initiative, participation and voice with state financial support, state oversight and statewide perspectives for evaluating local action.⁴³⁹ Such an integration of state and local concerns would be more appropriate than either a general expansion of local power or a centralization of authority in the states.

439. The three recent state court decisions vindicating school finance reform claims, see *supra* note 429, indicate the possibility that state legal systems will take an approach for education, a core local concern, at least when the limited fiscal capacity of poorer localities to provide the public service with the broadest implications for the long-term well-being of the national economy and the national polity has been demonstrated. Nonetheless, as the overall record of the courts in deciding school finance reform cases indicates, see Briffault *supra* note 1, at 24–39, it is too soon to treat these new decisions as a harbinger of a new era in the decades-old school finance reform movement, let alone as evidence of the beginning of the end of legal localism.

But to achieve such a pragmatic stance, the ideology of localism must be jettisoned and state and local problems examined without a preexisting commitment to the normative superiority of local power. I hope this Article, by demonstrating the scope of local legal authority in practice, examining some of the effects of local autonomy on urban development, exploring some of the differences among cities and suburbs and criticizing the dominant contemporary theories of localism, will provide a basis for the proper understanding of our localism and will serve as a first step in moving local government law beyond localism and toward a less abstract attention to particular substantive problems and policies.⁴⁴⁰

If I have been persuasive, the attitude of the reader should be that of Philip Roth's Doctor Spielvogel: "So [said the doctor]. Now vee may perhaps to begin. Yes?"⁴⁴¹

440. But cf. Libonati, *Reconstructing Local Government*, 19 *Urb. Law.* 645, 651 (1987) (describing critically most literature about urban government as "policy analysis").

441. P. Roth, *Portnoy's Complaint* 309 (1969).